IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-646

EDWARD GRADY PARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. 1a-21a, *infra*) is reported at 601 F.2d 1000 (1979).

JURISDICTION

The opinion of the Court of Appeals was filed on May 7, 1979. A timely Petition for Rehearing was denied on August 27, 1979. Pet. App. B, p. 22a, *infra*. On September 17, 1979, Mr. Justice Rehnquist extended the

time within which to file a petition for certiorari to and including October 19, 1979. Pet. App. C. p. 23a, *infra*. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a defendant's Sixth Amendment right to assistance of counsel with undivided loyalties is violated when the defendant's trial counsel also represents the prosecution's witness.

Whether a defendant can be held to have knowingly and intelligently waived his Sixth Amendment right to counsel free of a conflict of loyalties when the government has been found to have unethically created the conflict without the knowledge of either the defendant or his attorney, and the defendant, upon learning of the conflict, promptly moved for a mistrial.

Whether, assuming a conflict of loyalties violative of the Sixth Amendment caused by unethical conduct on the government's part, the defendant has a burden of proving "specific prejudice" in the record.

Whether "specific prejudice" is shown when the prosecution witness, a convicted felon and an alcoholic, was not significantly cross-examined after having testified inconsistently with a prior statement.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment and the Fourteenth Amendment, United States Constitution are involved.

Disciplinary Rule 7-104 of the American Bar Association Code of Professional Responsibility is also involved, and provides (footnotes omitted):

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

STATEMENT

INTRODUCTION

The petitioner, Edward Grady Partin, was convicted in the United States District Court, Southern District of California, San Diego, on October 4, 1977, after a jury trial, on three counts of conspiracy to obstruct justice in violation of 18 U.S.C. §§371 and 1503. This was petitioner's third trial on an indictment originally returned in the United States District Court for the Middle District of Louisiana on October 4, 1973. Pet. App. A, pp. 1-2 n.1, *infra*.

The government at petitioner's trial called as a witness against petitioner an individual (Harold Sykes) who had originally been indicted along with petitioner and subsequently convicted in a separate trial. Sykes, at the time he testified against petitioner, was represented by the petitioner's counsel. The Assistant U.S. Attorney, at the time Sykes was called as a witness, revealed for the first time that the government had secretly been in

contact with Sykes prior to the commencement of the third trial and had secured his cooperation. These contacts were deliberately concealed from petitioner and the attorney representing both petitioner and Sykes. Petitioner's counsel promptly and unsuccessfully moved for a mistrial on conflict of interest grounds, so that petitioner could secure new counsel. Petitioner himself personally and unsuccessfully objected to continuing the trial with his attorney.

On appeal, petitioner contended, *inter alia*, that he had been deprived of his Sixth Amendment right to assistance of counsel free of conflicts of interest by the government's actions. The Court of Appeals held that the government's conduct violated the Code of Professional Responsibility. See Pet. App. A p. 8a, *infra.* Although recognizing that the Sixth Amendment issue posed a serious question, the lower court affirmed petitioner's conviction, holding that: (1) petitioner had "waived" his Sixth Amendment right; (2) there was no actual conflict of interest; (3) petitioner had the burden of showing "prejudice" from the conflict he claimed existed; and (4) petitioner failed to meet this burden. See Pet. App. A, pp. 9a-21a, *infra.*

1. The May, 1974 Hearing on Multiple Representations.

The original three-count indictment against petitioner named eleven other defendants. Two of the co-defendants were Harold Sykes and Ben Trantham. At the time of the original indictment, eight of the defendants, including petitioner, Sykes and Trantham, were represented by the same retained counsel, James

McPherson.[1] The government was represented in all three trials by the same Assistant United States Attorney, Stephen A. Mayo. Separate trials were scheduled for several of the defendants.

On March 8, 1974, prior to petitioner's first trial, the government filed a "Motion to Recuse or Ascertain Counsel for Defendants" in which the government called attention to Mr. McPherson's joint representation, stated "That there is a unity of interest among these defendants who are jointly represented" (*id.*) and asked for a hearing in which the court might determine that the individual defendants each have "made an informed and knowledgeable decision as to the nature of his representation in view of the potential for a conflict of interest."

On May 30, 1974, the requested hearing was held before United States District Judge Nauman S. Scott, who subsequently presided at all of the trials resulting from the indictment.[2] At the hearing, Judge Scott noted that the defendants had "the right of assistance at trial of a capable and competent counsel" which "carries with it the right to have a lawyer whose concern is only with the interest of the individual defendant" and who did not have "any conflict of interest between two or more clients in the same case that may require him to make a difficult decision between them." M. Tr. 4-5. The court also noted that counsel "have advised me that they have discussed the question of conflict of interest with you and that each of them is satisfied in his own professional judgment that there

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[1] Two of the eight jointly represented defendants (Thomas and Brasseaux) also had another lawyer representing them.

[2] We shall cite the transcript of this hearing as "M. Tr. ___".

is no conflict of interest with respect to the charges against each of you and the defenses that might be asserted with regard to those charges." M. Tr. 5. The court then warned the defendants of "the possibility, although there appear to be no conflicts of interest now, it might develop at a later date that one or more of you may have different interests from the other." The court then illustrated this possibility with a hypothetical fact situation involving two co-defendants accused of robbery, one of whom decides to take the stand and blame the other. M. Tr. 5-6. The court re-emphasized that "I am not indicating any opinion that . . . Mr. McPherson has, in any way, a conflict of interest, actual or potential." M. Tr. 7.

At the conclusion, the court entered into a colloquy with one of the defendants, (Mr. Brasseaux) who was scheduled to go to trial first on the indictment, and who affirmed his satisfaction with the joint representation. The other defendants were directed to think about the matter and contact the court within ten days of the hearing date if they wished to change counsel. M. Tr. 8.

Mr. McPherson subsequently made his own statement for the record in which he assured the court "that if any of these individuals in any way indicate to me any possible conflict or concern that they have I would like to feel free to bring it to the Court." M. Tr. 10. The court agreed he could do so, noting "I don't want that to happen in the middle of a trial." M. Tr. 11.

2. The Events Between the May, 1974 Hearing and Petitioner's Third Trial.

After the May, 1974 hearing, several trials went forward for the other named defendants. Defendants Sykes and Trantham were tried together with three others and convicted in August 1974. Their convictions were reversed and remanded on June 19, 1975. See *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975). In July, 1975, Sykes and Trantham were again tried and convicted. Their convictions were affirmed on appeal. Trantham died while his appeal from this conviction was pending. Syke's conviction was affirmed and he filed a petition for certiorari in this Court, which was denied on October 17, 1977. *See Partin v. United States*, 434 U.S. 903 (1977). Sykes' petition was denied after petitioner's own conviction in his third trial. McPherson represented both Sykes and Trantham in their trials and appeals, and continued representing Sykes throughout petitioner's third trial. After Sykes' first trial, he was unable to afford counsel, so the court appointed McPherson to represent him.

Petitioner's first trial terminated in a mistrial on November 14, 1974. His second trial resulted in a conviction on March 4, 1975, which was reversed on May 19, 1977. See *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977).

McPherson represented petitioner at his first trial. At his second trial Trantham appeared as a government witness against petitioner. McPherson did not represent petitioner at this second trial.

3. Petitioner's Third Trial: The Government Reveals Sykes as its Witness.

Petitioner's third trial commenced on September 26, 1977. He was represented by McPherson in this trial; in addition, the day before the trial commenced,

another attorney (John Mitchell) was retained to act as local counsel. Tr. 72.[3]

On September 28, 1974, the second day of trial, the government called Sykes as its second witness in the case. Tr. 295. Counsel than approached the bench and, in the ensuing colloquy, the Assistant U.S. Attorney revealed for the first time that prior to the commencement of the trial he had telephone conversations with Sykes, and that the government had secured a signed statement from Sykes "which very clearly implicates Mr. Partin in a very clear obstruction of justice in hiding Claude Roberson through payments of money." Tr. 296.[4] Mayo informed the court that he had not informed McPherson of Sykes' statement because of his concern for "the safety of Mr. Sykes". Tr. 296.[5]

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[3]We shall cite the transcript of the third trial as "Tr. ____."

[4]This particular statement was signed by Sykes on September 8, 1977, eight days prior to the commencement of trial. See Court Exhibit 3. Subsequently, Mayo revealed in the colloquy with the court that the government had actually secured another statement from Sykes. Tr. 311. This statement was secured on July 20, 1977, some seven weeks before the trial began. See Court Exh. 2.

[5]In later colloquy Mayo indicated that Sykes had requested that no one be told because of concern for his safety. Tr. 307, 312. Sykes at the time was actually in federal custody. The trial court was never told why the government – which had used witness security programs and other methods to protect other witnesses (Tr. 296) – could not have protected Mr. Sykes adequately. Nothing in the record – other than Mr. Mayo's statements in colloquy – supported any claim of concern on Sykes' part; moreover, nothing in the record supported any contention that petitioner had made any threats against any witness in connection with this indictment. The Court of Appeals eventually found the government's dealings with Sykes violated the applicable Disciplinary Rule (Pet. App. A, p. 8a, *infra*) and denied the government's subsequent "Motion for Clarification" on this point as "moot." Pet. App. D, p. 24a, *infra*.

The U.S. Attorney further informed the court that he had concluded -- based on the signed statement the government had secretly secured from Sykes -- that Sykes and petitioner "have clearly conflicting interests . . ." (Tr. 296):

> And I am somewhat concerned about now whether you represent Mr. Sykes or whether you represent Mr. Partin, because the information I have right now is that they have clearly conflicting interests, Your Honor, which I have a signed statement on.

See also Tr. 297 ("[B]ased on the information that I have there is a clear conflict in the interest of Mr. Sykes and Mr. Edward Grady Partin in this trial"). The U.S. Attorney further elaborated that -- based on Sykes' statement -- Mr. McPherson was now in the posture of "representing parties on both sides of the fence." (Tr. 297-98):

> But there is clearly a conflict in interest. And we have a lawyer, Mr. McPherson, representing parties on both sides of the fence, and I would be glad to show you for an in camera inspection that statement, Your Honor.

McPherson called to the court's attention the fact that he was still representing Mr. Sykes in his pending petition for certiorari. Tr. 298. He asked the court to call Sykes into chambers and tell him that McPherson wanted to confer with him. Tr. 299. The court decided to interview Sykes alone, but on the record. In the ensuing meeting alone with Sykes, the court informed Sykes that McPherson wanted to confer with him on an attorney-client basis before he took the stand (Tr. 302-03), that Mayo had told the court that Sykes "no longer wanted to be represented or were not represented, one way or the other, by Mr. McPherson" (Tr. 302), that Mayo objected to Sykes talking with McPherson on this basis

(*id.*), and that the court now wished to know if Sykes wanted to consult with McPherson before taking the stand. *Id.*[6] Sykes told the court he would take the stand without speaking to McPherson. Tr. 304.

Upon the judge's return to the courtroom, after counsel were informed of the court's colloquy with Sykes, McPherson stated to the court that the new story the government had secretly secured from Sykes had, for the first time, created "a conflict of interest in representing Mr. Sykes and in representing Mr. Partin," that he could not proceed in the trial representing both of them, and that he could not "cross examine my client, Mr. Sykes." Tr. 306-07. He moved for a mistrial so that petitioner would have "an opportunity to obtain counsel where there will not be a conflict." Tr. 308.[7]

The court denied the mistrial motion, relying on the hearing held over three years earlier, in which the "possibility of a conflict of interest" was discussed (Tr. 313-14):

> I feel that this comes at poor grace after the conversation that the Court had with all of these defendants and the trouble the Court went through to get them all before me -- before the Court and telling them specifically of the possibility. The basis of the Court's statement was not, we know now a conflict and the Court didn't tell them, if you don't know now of a conflict, go ahead and have the same representation. The Court told them that in any conspiracy trial that there is not only -- I don't know whether I am saying the exact words, but not only a possibility but a probability of a conflict of interest cropping up. The way I see it is that that just happened. All of these people persisted, including Mr. McPherson and Mr. Partin, in this multiple representation. And I am surprised that it hasn't happened before, to be perfectly frank with you. And I don't feel that Mr. McPherson can certainly represent Mr. Sykes any longer. He can represent Mr. Partin. So to make it appear the other way around I don't think is realistic. Mr. McPherson was prepared to cross-examine this man one hour ago and then ceases representing him. I don't see that anything has changed, and so I will deny the motion for a mistrial.

In light of the court's ruling, Mr. McPherson then expressed concern about his own professional liabilities if he proceeded to cross examine Sykes (Tr. 314), particularly if "I have to go after Sykes' credibility." Tr. 316. After further colloquy, Sykes was brought back in and the court and McPherson secured a waiver of the attorney-client privilege from him. Tr. 319-25. During the course of this colloquy, McPherson told Sykes that he continued to represent him. Tr. 322-23; 325.

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[6] In fact, as Mayo later pointed out to the court, he had never said that Sykes wished to discharge McPherson as his attorney. Tr. 305-06. Nor had he ever objected to McPherson and Sykes consulting privately before Sykes took the stand.

[7] Local counsel Mitchell also advised the court that he had first been retained on the case the day before the trial began (Tr. 308), that his function was strictly one of local counsel (Tr. 308-09), and that he was unable himself to conduct the cross examination of Sykes. *Id.* He also urged a mistrial, pointing out that neither "the defendant nor his counsel had absolutely anything to do with [causing the problem], because this morning is the first time that counsel quite candidly for the government made counsel for the defendant aware of [Sykes'] statement." Tr. 310.

Assistant U.S. Attorney Mayo maintained that he had telephoned the court prior to the trial and told the court that Sykes had given the government a statement and would be a witness. Tr. 310. The court responded, "I don't recall, but I am sure you did." *Id.*

Thereafter, petitioner personally addressed the court, stating "I found out a few minutes ago that I have an attorney here representing me and a Government witness," that "I certainly don't want to go to proceed in a trial" and that "I don't want him representing me in this trial." Tr. 326. The court responded by referring to the hearing held over three years earlier, and telling petitioner that "it is very, very late in the game to do this and that really it was at your own insistence and the insistence of the other defendants that this thing has come to pass, and for that reason I feel that I cannot relieve Mr. McPherson from representing you in this case." Tr. 327-28. Petitioner then respectfully inquired of the court "how I caused Harold Sykes to be a Government witness because I had Mr. McPherson as attorney?" The court responded, "I have no idea." *Id.*

Mr. Sykes then took the stand and testified against petitioner. His examination by the government exceeds forty pages of transcript. Tr. 328-68 (direct examination); Tr. 370-71 (re-direct examination). His cross examination by McPherson consists of less than three pages. Tr. 368-70. On direct examination he repeatedly testified to inculpatory communications with petitioner which were not included in his first statement given secretly to the government. *See* Tr. 328-68 and *compare* Court Exhibit 2.[8] Despite the fact that he was a convicted felon serving a sentence who also suffered from a long history of alcoholism, and that the events he was testifying to occurred many years earlier, no

[8]The two Sykes statements were marked as Court Exhibits 2 and 3, but not shown to the jury. Tr. 371-72. The Assistant U.S. Attorney himself described these two statements as "contradictory." Tr. 311.

attempt whatsoever was made to challenge his credibility or his memory on cross-examination. In fact, he was not subject to any significant cross-examination at all. *See* Tr. 368-70.

4. The Decision of the Court of Appeals.

The Court of Appeals agreed with petitioner's contention that the government had violated ABA Disciplinary Rule 7-104 by not notifying McPherson of its contacts with Sykes. Pet. App. A, p. 8a, *infra.* The court also recognized as a serious question whether petitioner's Sixth Amendment right to effective assistance of counsel had been violated, a right which the court acknowledged "includes the right to be represented by counsel whose loyalties are undivided." Pet. App. A, p. 9a, *infra.* The court decided that petitioner's Sixth Amendment rights were not violated for the following reasons.

First, the court held that petitioner "knowingly and intelligently" waived his right to counsel whose loyalties were undivided because: (a) he had been warned over three years earlier that a possible conflict might arise at some time in the future; and (b) in his second trial the government had called another original co-defendant (Trantham) who was then represented by McPherson in a pending appeal. Pet. App. A, pp. 11a-15a, *infra.*[9]

Second, the court reasoned that Sykes' waiver of the attorney-client privilege "avoided the occurrence of any actual conflict of interest." Pet. App. A, pp. 11a, 15a-16a, *infra.*

Third, the court reasoned that since petitioner had been warned earlier of the possibility of a conflict of

[9]Yet the court acknowledged that petitioner had secured different counsel to represent him at his second trial. Pet. App. A, p. 14a, *infra.*

interest arising, he had the burden of demonstrating specific prejudice arising from the conflict. Pet. App. A, p. 17a, *infra.* The court inferred from the record that counsel's failure to cross-examine Sykes was attributable to a tactical judgment not to let the government bring out Sykes' prior conviction on the same conspiracy charge alleged against petitioner. The court therefore concluded that petitioner failed to meet his burden. Pet. App. A, pp. 16a-17a, *infra.*

5. Subsequent Appellate Rulings.

Petitioner filed for rehearing on May 17, 1979. On May 30, 1979, the government filed its own "Motion for Clarification of the Opinion" which challenged the court's findings of governmental violation of Disciplinary Rule 7-104. On June 17, 1979, petitioner filed a Motion for Remand requesting an evidentiary hearing respecting the Sykes-Government communications (which has never been held). On August 10, 1979, the court denied the government's motion "as moot," and denied petitioner's motion for remand. Pet. App. D, E, pp. 24a-25a, *infra.* On August 27, 1979, seven months after its initial decision, the court denied the petition for rehearing. App. B, p. 22a, *infra.* The next day, the court amended its order denying petitioner's request for a remand to state that it was "denied without prejudice to resubmission of said motion for new trial based upon after-discovered evidence to the district court in the event the district court is inclined to grant a new trial. . . ." Pet. App. F, p. 26a, *infra.*

REASONS FOR GRANTING THE WRIT

Petitioner now stands convicted after a Federal criminal trial in which his own attorney was, in the words of the government, "representing parties on both sides of the fence." See p. 9, *supra.* This circumstance constitutes the clearest possible example of a conflict of interest, going directly to the heart of petitioner's fundamental Sixth Amendment right. Most importantly, this circumstance was directly and consciously brought about by the government's actions, which actions have been found by the lower court to constitute a violation of the established rules governing conduct of government prosecutors in federal criminal trials. It is difficult to imagine a more stark example of governmental intrusion on a constitutional right that this Court has repeatedly emphasized goes directly to the heart of a defendant's most basic and essential due process rights. *See Holloway v. Arkansas,* 435 U.S. 475, 489 (1978); *Schneckloth v. Bustamonte,* 412 U.S. 218, 241-42 (1973).

So fundamental is this Sixth Amendment right to assistance of counsel with undivided loyalties that this Court has stated that it is the duty of Federal courts to "indulge every reasonable presumption against . . . waiver . . . ." *Glasser v. United States,* 315 U.S. 60, 70 (1942). Yet a fair reading of the lower court's opinion here demonstrates that in petitioner's case the court indulged every conceivable presumption in favor of waiver. Even so, the rulings of the court below are flatly contradicted by the record, and squarely in conflict with the decisions of several other circuits as well as controlling decisions of this Court.

Specifically: (1) The lower court's findings of no actual conflict of interest are contradicted at least by decisions in the Fifth Circuit, *e.g., Stephens v. United States,* 595

F.2d 1066 (1979); *Zuck v. Alabama,* 588 F.2d 436, *cert. denied,* 48 U.S.L.W. 3187 (1979); the Seventh Circuit, *e.g., Zurita v. United States,* 410 F.2d 477 (1969); *United States v. Jeffers,* 520 F.2d 1256, *cert. denied,* 423 U.S. 1066 (1973); and the District of Columbia Circuit, *e.g., Taylor v. United States,* 96 U.S. App. D.C. 379, 226 F.2d 337 (1955). *See also United States v. LaVallee,* 282 F. Supp. 968 (E.D.N.Y. 1972). That ruling also conflicts with controlling principles in this Court's decision in *Holloway v. Arkansas,* 435 U.S. 475 (1978). *See generally* pp. 17-23, *infra.* (2) The lower court's rulings on waiver of constitutional rights conflict with *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Brewer v. Maryland,* 430 U.S. 387 (1977) and decisions of other circuits. *See generally* pp. 23-27, *infra.* (3) The lower court's rulings on "specific prejudice" are squarely contradicted by this Court's decision in *Holloway v. Arkansas, supra,* and numerous holdings of other circuits. *See generally* pp. 27-29, *infra.* These conflicts should now be resolved by this Court.

Moreover, the fundamental underlying issue in this case goes to the very heart of the administration of justice in an adversary system. The Sixth Amendment guarantees a criminal defendant that in his confrontation with the Federal government he will have the support of a lawyer with undivided loyalty and fidelity to his cause. That constitutional guarantee supports the entire edifice of constitutional rights designed to assure the defendant a fair trial. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 241-42. Yet, that guarantee will become hollow indeed if the government may secretly manipulate the trial process so that the defendant is suddently confronted in mid-trial with the reality that his lawyer is actually "on both sides of the fence." This Court should grant the writ and set forth the ethical and constitutional limits intended to

govern participants in Federal criminal trials, so that trial judges, defense lawyers, and prosecutors will be able to discharge their duties properly in the adversary system.

1. The Court of Appeals' Holding of no Actual Conflict of Interest is Squarely Contradicted by Controlling Precedents of this Court and Decisions of at Least Three other Circuits.

The lower court acknowledged that the Sixth Amendment right to counsel "includes the right to be represented by counsel whose loyalties are undivided" (Pet. App. A, p. 9a, *infra*) but decided that Sykes' waiver of his own attorney-client privilege "avoided the occurrence of any actual conflict of interest." *Id.* p. 11a, *infra.*

But an actual conflict of interests of constitutional dimensions is automatically established when an attorney is "on both sides of the fence" by virtue of his simultaneous representation of a defendant and a prosecution witness testifying against his client. Thus, the principle of "undivided loyalties" is a central component of Canon Five of the A.B.A. Canons of Ethics, which governs conflicts of interests. *See* A.B.A. Code of Professional Responsibility, Canon Five, and Ethical Consideration 5-1. That principle is also central to the Sixth Amendment's command. *Zuck v. Alabama,* 588 F.2d 436, 438-40 (5th Cir.) *cert. denied,* 48 U.S.L.W. 3187 (1979); *Castillo v. Estelle,* 504 F.2d 1243, 1245 (5th Cir. 1974); *Zurita v. United States,* 410 F.2d 477, 479-80 (7th Cir. 1969).

Other circuits have repeatedly held that, under the Sixth Amendment, an actual conflict of interest is shown when the record demonstrates the defense attorney is simultaneously representing a witness for the opposite side. In *Stephens v. United States,* 595 F.2d 1066 (5th Cir. 1979), the defendant's attorney also represented a

co-defendant who had pleaded guilty and testified as a prosecution witness at the trial. The attorney conducted "a detailed cross-examination" of the witness covering, *inter alia,* the details of his plea bargain. 595 F.2d at 1067. The attorney "was apparently unaware that [the witness] had agreed to testify against Stephens, although he suspected as much." *Id.* The District Court, after a hearing under 28 U.S.C. §2255, denied a new trial because of failure to show prejudice from the conflict. The Court of Appeals reversed, holding that Stephens could not be required to show prejudice because he was represented by an attorney "with an actual, flagrant conflict of interest based on his concurrent representation of a witness for the prosecution to whom he owed the unfettered duty of complete, legitimate support, not the task of undermining and tearing down his acceptability." 595 F.2d at 1069.

In *Castillo v. Estelle,* 504 F.2d 1243 (5th Cir. 1974), the defense attorney was simultaneously representing, *in an unrelated civil litigation,* a principal witness for the prosecution who was the victim of the offense charged. The Court observed (504 F.2d at 1245, emphasis added):

> Here Bardin was not only the victim but also a principal witness for the prosecution. In these circumstances, counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused is thus counter-poised against solicitude for his client the witness. The risk of such ambivalence is something that no attorney should accept and that no court should countenance, much less create. *We hold that the situation created by the facts of this case is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation essential to a fair trial.*

The Court specifically noted that "we need not inquire into [allegations of specific prejudice]." 504 F.2d at 1245.

In *Zuck v. Alabama,* 588 F.2d 436, 438 (5th Cir.), *cert. denied,* 48 U.S.L.W. 3187 (1979), the Fifth Circuit again surveyed its precedents in this area -- including the *Castillo* case -- and observed that "[t]hese decisions establish that when the dual representation of the defendant and another participant in a criminal trial creates a conflict of interest, the trial is fundamentally unfair as a matter of law." In *Zuck,* the only conflict was that the law firm of the defense attorney was representing the prosecutor in an unrelated civil matter. 588 F.2d at 438. Yet the court, relying squarely on *Castillo,* rejected the State's contention that no actual conflict existed, observing that "the basis of these decisions is our belief that the sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client." 588 F.2d at 440.

In *Zurita v. United States,* 410 F.2d 477 (7th Cir. 1969), the defendant, in a motion to vacate sentence under 28 U.S.C. §2255, asserted that his attorney had business dealings with the bank he was convicted of robbing and had also "handled certain legal matters" for the bank. *Id.* at 478. The district court had deemed unnecessary an evidentiary hearing, reasoning that the facts alleged did not amount to a sufficient conflict of interest in view of the "zealous defense" of the defendant. *Id.* The Seventh Circuit, taking note of allegations of prejudice, reversed and stated that if the attorney "were shown to have actually represented the bank at a time when the bank's interest in petitioner's trial conflicted with that of petitioner, we would be presented with a situation so

'fraught with the dangers of prejudice,' that a new trial would be required." *Id.* at 480 (*quoting People v. Stoval,* 40 Ill.2d 109, 113, 239 N.E.2d 441, 443 (1968)).

Subsequently the Seventh Circuit, in *United States v. Jeffers,* 520 F.2d 1256, 1264 n.13 (1975), *cert. denied,* 423 U.S. 1066 (1976), cited both *Zurita* and *Castillo* for the proposition that when there is an on-going relationship between the attorney for the defendant and an adverse witness, the "inherent attendant hesitancy of counsel to completely cross-examine a current client, creates a very real conflict of interest and requires a mistrial if the conflict is disclosed, or a new trial, if the conflict is only discovered later."

To like effect are several cases in the District of Columbia Circuit. *See Taylor v. United States,* 96 U.S. App. D.C. 379, 226 F.2d 337 (1955) (per curiam) (defendant entitled to new trial on motion under 28 U.S.C. §2255 where represented by counsel who was also representing government witness);[10] *District of Columbia v. Scott,* 94 U.S. App. D.C. 227, 214 F.2d 860 (1954) (per curiam), *aff'g Scott v. District of Columbia,* 99 A.2d 641 (D.C. 1953).

The lower court here relied on this Court's decision in *Holloway v. Arkansas,* 435 U.S. 475 (1978), to support its conclusion that Sykes' testimony "did not result in a conflict of interest for McPherson." Pet. App. A, p. 15a, *infra.* Yet, *Holloway* compels the opposite conclusion.

The Court in *Holloway* addressed the far more typical problem of "the actuality or possibility of a conflict" of interest where an attorney representing multiple defend-

[10]The facts in *Taylor v. United States, supra,* are described in detail in *United States v. LaVallee,* 282 F. Supp. 968, 972 (E.D. N.Y. 1972).

ants advises the court of a conflict problem. 435 U.S. at 483. In that context, the Court observed, there is no *per se* rule of a conflict "violative of constitutional guarantees" because of the possible tactical advantages of joint representation. *Id.* at 482. Not a word in *Holloway* supports the contention that this Court would ever hold that a joint representation of a criminal defendant and a prosecution witness testifying against that same defendant was anything other than a classic example of inherent actual conflict of interest violative of the Sixth Amendment, particularly in circumstances where the government has concealed its dealings with the witness from the attorney and the defendant. *Compare United States v. Hayman,* 342 U.S. 205, 219 (1952) *with Holloway v. Arkansas, supra.*

Moreover, the *Holloway* Court's extensive discussion of the nature of a disabling conflict of interest under the Sixth Amendment demonstrates that the lower court's holding of no "actual conflict" is clearly wrong. The lower court based its conclusion on the theory that Sykes' waiver of the attorney-client privilege freed McPherson to cross-examine his client Sykes on the basis of otherwise confidential information in order to aid his client Partin. But McPherson continued to have a professional duty of "undivided loyalty" to Sykes even had he chosen -- which he did not -- to significantly cross-examine him. In *Holloway* this Court warned that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." 435 U.S. at 489-90. The Court illustrated this point by noting that "in this case it *may* well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution. . . ." *Id.* at 490 (emphasis added). *See also id.* ("But in a

case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process".) None of these concerns are answered by a waiver of the attorney-client privilege. Simply put, a waiver of the right to confidentiality in a client's communications with a lawyer is not a waiver of the fundamental constitutional right to a lawyer's undivided loyalty and fidelity to a client's cause.

Here attorney McPherson confronted a client on the witness stand testifying before the very judge who tried him once, sentenced him once, and would re-try him and re-sentence him again if this Court had granted his then-pending petition for certiorari and reversed his conviction. How could a responsible attorney in these circumstances feel ethically free to tear apart his own vulnerable client-witness in order to save his client-defendant? Also, just as in *Holloway,* (435 U.S. at 90), McPherson had to consider the impact of effective cross-examination on his client-witness' hopes for benefits from the government in the future if cross-examination broke down the story the government relied on at trial.

Moreover, as the lower court acknowledged, even in the more typical joint representation context addressed in *Holloway,* a timely motion for appointment of separate counsel should ordinarily be granted. *See* Pet. App. A, p. 15a, *infra; Holloway v. Arkansas, supra,* 435 U.S. at 485. Here petitioner's mistrial motion was timely, having been made as soon as the government disclosed the circumstances creating the actual conflict of interest. *See* p. 10, *supra.* The lower court characterized petitioner's motion as "untimely" on the sole ground that petitioner and McPherson knew of Trantham's appearance as a witness at his second trial. *See* Pet. App. A, p. 15a n.9, *infra.* But petitioner secured different counsel to represent him at the second trial. Therefore, there was no basis at that trial for a mistrial motion on grounds of actual conflict of interest. In the instance of Sykes' appearance, the government prevented petitioner and McPherson from avoiding the conflict before trial by concealing until the middle of trial its contacts with Sykes. As soon as the government revealed the actual conflict of interest, McPherson exercised his duty "to advise the court at once of the problem." *Holloway v. Arkansas, supra,* 435 U.S. at 485-86.

2. The Lower Court's Finding of Waiver Conflicts with Controlling Decisions of this Court and Other Circuits.

In *Schneckloth v. Bustamonte,* 412 U.S. 218, 241 (1973), this Court extensively re-examined the law of waiver of constitutional rights and emphatically reiterated the long-standing rule that the strictest possible standard of "waiver" is applicable to those constitutional rights "guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial . . . . [a] prime example [of which] is the right to counsel." Specifically, waiver of petitioner's rights here requires an "intentional relinquishment or abandonment of a known right or privilege." 412 U.S. at 243, *quoting Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). "[E]very reasonable presumption ought to be indulged" against waiver of the right to counsel with undivided loyalties in criminal trials. *See* 412 U.S. at 243; *Glasser v. United States,* 315 U.S. 60, 70 (1942). That, of course, is the law of the other circuits. *E.g., United States v. Garcia,* 517 F.2d 272, 276-78 (5th Cir. 1975);

Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954). The short of the matter is that the Government has the burden of proving a waiver under the strictest possible constitutional standard. *See Brewer v. Williams,* 430 U.S. 387, 404 (1977); *Zuck v. Alabama, supra,* 588 F.2d at 440.

In petitioner's case, the lower court's finding of "waiver" is not only squarely in conflict with these principles, but also hopelessly contradictory as a matter of its own reasoning. Thus, the lower court initially relies on the trial court's warning to petitioner -- over three years earlier -- of a possibility of a conflict of interest arising in the future by virtue of his counsel's joint representation. Pet. App. A., pp. 11a-13a, *infra.* Yet at this time the operative event generating the actual conflict -- the government's unethical and surreptitious contacts with Sykes during which he turned into a prosecution witness -- had not yet occurred. And this Court's decisions make clear that "waiver" requires "'sufficient awareness of the relevant circumstances and likely consequences.'" *Schneckloth v. Bustamonte, supra,* 412 U.S. at 238 n.25, *quoting McMann v. Richardson,* 397 U.S. 759, 766 (1970). Here, as the trial court, the defense counsel, and the U.S. attorney acknowledged at the time of the 1974 hearing, (*see* pp. 5-6, *supra*) the "relevant circumstance" -- *i.e.,* an actual conflict of interest -- did not yet exist. Thus, the lower court acknowledges that (Pet. App. A, p. 13a, *infra*):

> If the conflict of interest problem which Partin raises on appeal had been a completely unknown contingency prior to his trial, we might be reluctant to find a waiver of his right to counsel free from conflict of interest solely on the basis of Judge Scott's 1974 warning. To do so might force a defendant to waive his right to object to unknown problems at his trial.

To escape the horns of this seemingly insolvable dilemma, the court is forced to rely on the theory that "Partin was aware of the possibility that a co-defendant, represented by McPherson, would testify as a government witness at his trial" because, at his second trial, the government called as a witness another co-defendant (Trantham) represented by McPherson. Pet. App. A, pp. 14a-15a, *infra.* Yet, the lower court also acknowledged at the same time that petitioner *secured different counsel to represent him at his second trial.* Somehow, the fact that petitioner in the second trial avoided the conflict that the government surreptitiously generated in the third trial is turned by the lower court into the dispositive factor proving that petitioner "waived" the conflict at the third trial. The lower court offers one Delphic sentence to explain this logic (Pet. App. A., p. 14a, *infra*):

> The fact that Sykes, not Trantham, testified at the third trial does not change the fact that the type of conflict which occurred was known prior to trial by both Partin and McPherson, who had reviewed the record of the earlier trial in preparation for trial.

The government clearly cannot show waiver under the applicable constitutional standard. *See Zuck v. Alabama, supra,* 588 F.2d at 440 (rejecting state claim of waiver of the conflict even though witness testified she told defendant prior to trial that his attorneys were also representing the prosecutor); *People v. Stoval,* 40 Ill.2d 109, 113-114, 239 N.E.2d 441, 444 (1968) (under *Johnson v. Zerbst,* no waiver of conflict shown even where defendant told before trial his lawyer represented victim of the crime in civil matters). *And see Stephens v. United States, supra,* 595 F.2d at 1067.

Finally, it is clear that the March, 1974 hearing alone could not provide a basis for a valid holding of "waiver." *First,* more than three years intervened between the hearing itself and the occurrence of the operative event at petitioner's third trial giving rise to the conflict of interest. Thus, in petitioner's case, "the advice [was not] reasonably contemporaneous with the asserted waiver of the right." *See Schram v. Cupp,* 436 F.2d 692, 695 (9th Cir. 1970), and cases cited therein. *Second,* upon the disclosure by the government to the trial court of the operative events creating the conflict of interest, it became the duty of the trial court to again advise petitioner of his rights and provide him with an opportunity to secure separate counsel. *See Stephens v. United States, supra,* 595 F.2d 1068; *United States v. Gaines,* 529 F.2d 1038, 1043-44 (7th Cir. 1976).[11] The lower court here stated "that Judge Scott's inquiry and warning [at the May 1974 hearing] is the type suggested by proposed Federal Rules of Criminal Procedure, Rule 44(c)." Pet. App. A, p. 12a, *infra.* Yet the Advisory Committee Note to that

[11] Assistant U.S. Attorney Mayo maintained that he had telephoned the court prior to the trial and informed the court that Sykes had given a statement and that he was going to be a witness in the trial. Tr. 310. The Court responded to this assertion, "I don't recall, but I am sure you did." *Id.* Assuming Mayo did in fact telephone the court, then the court was on notice of the actual conflict of interest and clearly breached its affirmative duty to petitioner and his counsel to inform them of the circumstances. *See Schneckloth v. Bustamonte, supra,* 412 U.S. 218, 244 n.32 (1973); *Stephens v. United States, supra,* 595 F.2d at 1068-69. Assuming Mayo did not in fact inform the court prior to trial, then the court's affirmative duty to advise petitioner appropriately of his rights and afford him an opportunity to exercise those rights arose at the point during the third trial when the government disclosed the relevant circumstances on the record.

rule (which has since been adopted) states (25 Crim. L. Rptr. 2259, June 13, 1979):

> "The obligation placed upon the court by rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest."

Certainly the lower court was correct in its judgment that the May 1974 hearing alone was insufficient to effectuate a waiver of petitioner's constitutional rights in the circumstances of this case. *See p. 13a, supra.*

3. The Lower Court's Rulings on Specific Prejudice Conflict with Controlling Decisions of This Court and other Circuits.

The lower court held that petitioner "bears the burden of demonstrating that specific prejudice has resulted to him from the alleged conflict of interest," and that petitioner "has not met that burden." Pet. App. A., p. 17a, *infra.*

In *Holloway v. Arkansas, supra,* 435 U.S. 487-91, this Court assayed the law on the issue of "specific prejudice" and held that -- even in the more typical "joint representation" context -- "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. *A fortiori,* in petitioner's case, given the existence of an actual conflict of interest concealed by the government that had not been waived and had been timely objected to, his conviction must be reversed, without regard to "specific prejudice." The other circuits, following this Court's lead in *Glasser v. United States, supra,* (discussed in *Holloway,* 435 U.S. at 481-83), have required no showing of "specific prejudice" in the face of this type of actual conflict, even

before this Court decided *Holloway*. *E.g., Castillo v. Estelle,* 504 F.2d 1243, 1245 (5th Cir. 1974); *Whitaker v. Warden,* 362 F.2d 838, 841 (4th Cir. 1966); *Sawyer v. Brough,* 358 F.2d 70, 73 (4th Cir. 1966); *Taylor v. United States,* 226 F.2d 337 (D.C. Cir. 1955).[12]

Moreover, there is no basis for placing the burden on the defendant to prove "specific prejudice" when the government has been found to have created the actual conflict threatening the constitutional right. In these circumstances, any burden on the prejudice issue must be on the government, which must show no "taint" in the record created by its impermissible intrusion into petitioner's Sixth Amendment right. *Cf. Alderman v. United States,* 394 U.S. 165, 181 (1969).[13]

Finally, "specific prejudice" is overwhelmingly demonstrated on the record in this case. The short of the matter is that Sykes -- who repeatedly and directly inculpated petitioner in over forty pages of testimony -- was not significantly cross-examined at all. *See* pp. 12-13, *supra.* That Sykes was vulnerable on cross-examination cannot seriously be gainsayed: he was an alcoholic, a convicted felon, and he had given at least one prior inconsistent statement. Also, he testified about events which occurred many years prior to the third trial. None of these circumstances were brought out in cross-examination.

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[12]See also *United States v. LaVallee,* 282 F. Supp. 968, 973-74 (E.D.N.Y., 1978), discussing the cases before *Holloway* extensively.

[13]If this petition is granted, petitioner will also contend that the time has come to adopt, as a prophylactic rule for federal criminal cases under this Court's supervisory powers, a requirement of automatic reversal where the prosecution has been found to have intruded on the Sixth Amendment right by conduct violative of applicable disciplinary rules.

The lower court inferred from the record (without benefit of any direct testimony) that "specific prejudice" was not shown, because the court attributed McPherson's handling of Sykes cross-examination to a tactical decision not to let the Government bring out Sykes' prior conviction. Pet. App. A, pp. 16a-17a, *infra.*

But petitioner was constitutionally entitled to have tactical judgments of this type made by a lawyer with undivided loyalties to him, rather than by a lawyer placed in an inherent conflict of interest by the government's conduct. This constitutional right was lost to petitioner, over his specific and timely objection; the prejudice apparent in the record may not now be ignored by *post hoc* "unguided speculation" on appellate review of what tactical decision a lawyer with undivided loyalties to petitioner might have made. *Cf. Holloway v. Arkansas, supra,* 435 U.S. at 491.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD GRADY PARTIN, Defendant-Appellant.	))))))	No. 77-3853 OPINION

Appeal from the United States
District Court for the
Southern District of California

BEFORE: TRASK and WALLACE, Circuit Judges, and HOFFMAN, District Judge.*

HOFFMAN, District Judge:

Edward Grady Partin appealed his conviction of October 4, 1977 on three counts of conspiracy to obstruct justice in violation of 18 U.S.C. §§371 and 1503. We have jurisdiction of the appeal, 28 U.S.C. §§1291 and 1294.

Partin was indicted on October 4, 1973 in the Middle District of Louisiana on three counts of conspiracy to obstruct justice. The trial which is the subject of this appeal was Partin's third trial under this indictment and it was held in San Diego, California, pursuant to Rule 21(a), F. R. Cr. P.[1] The indictment under which Partin

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Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

[1]Partin's first two trials under this indictment were held in Louisiana. His first trial was in November 1974. It ended in a

was charged also charged eleven other persons, each of whom was named in only one count of the indictment. Two of Partin's codefendants were Harold Sykes and Ben Trantham, both of whom were named in Count II of the indictment.[2] The persons named in the indictment were not tried as one group; Partin was tried alone. Partin retained James McPherson as his attorney at his first and third trials. He was also represented in his San Diego trial by attorney Mitchell, who served as local counsel with McPherson and participated briefly throughout the trial. McPherson was likewise retained by Sykes,[3] Trantham and five other codefendants, representing them at their trials and in their appeals.

The indictment charged Partin and other codefendants with conspiracies to change the testimony of witnesses and to prevent witnesses from testifying in

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mistrial after one day. His second trial was in February and early March 1975 and resulted in a conviction on all three counts. On May 19, 1977, that conviction was reversed and the case remanded. *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977). Partin was also thrice tried on a prior indictment which was later dismissed. These trials, resulting in a mistrial in Montana, a new trial granted in Georgia, and a conviction and reversal in Georgia, *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974), brought about the dismissal.

[2]Sykes and Trantham were first tried and convicted in August 1974. Their convictions were reversed and remanded on June 17, 1975. *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975). In July 1975, Sykes and Trantham were again tried and convicted. Their convictions were affirmed on appeal on May 19, 1977. *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977). Sykes then petitioned for a writ of certiorari, which was denied on October 17, 1977, a few days after the present trial was concluded. *Partin v. United States*, 434 U.S. 903 (1977).

[3]Sykes originally retained McPherson. After his first trial and appeal he ran out of money and McPherson was appointed to represent him. Trantham did not apply for certiorari.

connection with two previous criminal cases in which Partin was a defendant. Partin was not convicted in either of those cases. The history of the earlier cases and the genesis of the indictment under which Partin now stands convicted are set forth in *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (reversing Partin's first conviction under the indictment because of an erroneous jury instruction which required only "slight evidence" to connect Partin with the conspiracy).

In May 1974, before any of the codefendants had come to trial, the government filed a motion requesting that the trial judge hold a hearing regarding the representation of eight of the codefendants by one attorney, James McPherson. McPherson had been retained by Partin and the codefendants; he was not appointed. The government was concerned with the possibility that this multiple representation could create a conflict of interest for McPherson and deprive defendants of their Sixth Amendment right to the assistance of counsel unimpaired by any conflict of interest. See: *Glasser v. United States*, 315 U.S. 60 (1942); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

Judge Nauman S. Scott, United States District Judge for the Western District of Louisiana,[4] held a hearing at which all of the codefendants and attorney McPherson, as well as Partin, were present. At the hearing Judge Scott questioned McPherson about his representation of multiple defendants. McPherson informed Judge Scott that he had discussed the case with his clients and was satisfied that there was no conflict of interest. McPherson also stated that he had discussed with his clients

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[4]Judge Scott presided at all three of Partin's trials.

the possibility of unforeseen conflicts arising and that his clients still wished to be represented by him even though they understood there might be conflict of interest problems in that representation.

After questioning McPherson, Judge Scott addressed the codefendants and advised them of the importance of their Sixth Amendment right to the effective assistance of counsel and specifically of their right to be represented by counsel who were free from any conflict of interest. He informed them of the potential problems of multiple representation and specifically of the problems created by one codefendant testifying against another codefendant. He advised them that if they could not afford separate counsel, the court would appoint counsel for them. He asked them if there were any questions; there were none. Judge Scott then told all defendants to contact the clerk of the court in Baton Rouge, Louisiana, if they wished to have counsel appointed for them.[5] No defendant responded to the invitation.

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[5]The pertinent portion of Judge Scott's advice to the codefendants stated in part:

> Counsel whom you have retained in this matter; that is, Mr. McPherson and Mr. Atkins, have advised me that they have discussed the question of conflict of interest with you and that each of them is satisfied in his own professional judgment that there is no conflict of interest with respect to the charges against each of you and the defenses that might be asserted with regard to those charges. In addition, each has informed me that he has discussed with you the questions which may arise in the future and the possibility, although there appear to be no conflicts of interest now, it might develop at a later date that one or more of you may have different interests from the other. I do not mean to question the judgment of either of them in this regard, I

[footnote continued]

Partin's first trial was held on November 13, 1974. He was to be tried along with two other codefendants. However, a mistrial was declared after the first day of

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> do want, however, to advise you to think carefully about this matter, about what is in your own best interest, and about your constitutional rights. Let us assume a different kind of charge. Let us assume that two people are charged with robbing a bank and are being tried jointly. Let's assume they are both being represented by the same lawyer. It might happen during the course of that trial that one of the persons charged with the crime might want to change his defenses in the middle of the trial. He might want to take the witness stand and testify that the other person in some way forced him to participate in the bank robbery. If that happened in the case of the two bank robbers, and if they were both represented by the same lawyer, obviously one would have a different interest from the other and the lawyer would have a conflict of interest. If one defendant could take the witness stand and begin to testify against his co-defendant he might end up being acquitted, but he would undoubtedly add to the evidence against the co-defendants. . . . I simply want to advise that if you think that you have a lawyer who has or may have a conflict of interest, and if you wish to change counsel, the Court will appoint another counsel to represent you. Any person who is not able; that is, financially not able to afford a lawyer, can have a lawyer appointed for him without charge. . . . If however, you are satisfied with your present counsel and you are satisfied to run any risks that may hereafter develop of a possible conflict of interest, you certainly have the right to do this. . . . Now, if anyone has any questions they would like to ask me about this? All right. . . .
>
> I would, however, say that if you wish other counsel I would like -- well, I will give you a chance to think about it and if you wish other counsel, you may contact the Clerk of the Court here in Baton Rouge and make such a request on or before ten days from this date.

At the time Judge Scott set a ten-day time limit, it was anticipated that the various trials would be completed in a short period of time. As will be seen, *infra*, this time limit has no bearing on this appeal.

trial and the two codefendants were severed from Partin's trial.

Partin's second trial was held from February 17 to March 4, 1975 and resulted in a conviction on all three counts of the indictment. At this trial Partin did not retain attorney McPherson to represent him. One of Partin's codefendants, Ben Trantham, testified as a government witness against Partin at the trial. Trantham's testimony concerned Count II of the indictment. At the time Trantham testified he was appealing his conviction on Count II of the indictment.[6] He had been represented at his trial and, at the time he testified, he was being represented on appeal by McPherson. Partin's conviction was reversed by the Fifth Circuit on May 19, 1977. *United States v. Partin, supra.*

As mentioned above, Partin's third trial (presently before us) was held in San Diego as a result of a transfer motion. This trial was held from September 26 to October 4, 1977, and resulted in Partin's conviction on all three counts of the indictment. At this trial Partin retained attorney McPherson to represent him. Although McPherson's client Trantham did not testify at this trial, McPherson's client and Partin's former codefendant Harold Sykes appeared as a government witness. At the time of his testimony at Partin's trial, Sykes had been convicted on Count II of the indictment and was being represented by McPherson on a petition for writ of certiorari to the United States Supreme Court.[7]

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[6] *See* note 2, *supra.*

[7] *Id.*, note 2, *supra.*

Partin raises a number of issues in his appeal, the first two of which are related to the appearance of his original codefendant, Harold Sykes, as a government witness at trial. In connection with Sykes' appearance Partin raises the following issues: (1) whether the government's contact with Sykes, which was done without the knowledge of Sykes' attorney, McPherson, was unethical and grounds for reversing Partin's conviction; (2) whether Partin's representation at trial by attorney McPherson, who also represented former co-defendant/government witness Sykes, denied Partin his Sixth Amendment right to the effective assistance of counsel. The two other issues raised by Partin are (3) whether the jury instruction concerning the witness security program which was given during the course of trial, was prejudicial to Partin and, therefore, grounds for reversing his conviction; and (4) whether Judge Scott's refusal to recuse himself was error.

Government Contact with Sykes

Shortly after Sykes' conviction was affirmed by the Fifth Circuit, Sykes called Assistant United States Attorney Mayo, the prosecutor in charge of the trials of Partin and his codefendants. Sykes told Mayo that he wished to cooperate with the government because he believed that attorney McPherson considered Partin's interests to be paramount to his. Sykes requested that his cooperation be kept a secret because he feared for his safety if his cooperation became known. Subsequently, Sykes gave two statements to the FBI prior to Partin's trial. He signed a waiver of his right to counsel at the time he gave these statements. McPherson represented Sykes during this period of time. However, Mayo did not inform McPherson of his contact with

Sykes or of the FBI interviews with Sykes. No attorney represented Sykes in his contacts with the government.

Appellant Partin argues that Assistant United States Attorney Mayo violated ABA Disciplinary Rule 7-104[8] in not notifying McPherson of his contacts with Sykes and that such an ethical violation is reversible error. We agree with appellant that Mayo's action violated Disciplinary Rule 7-104; however, the violation is not, on the facts of this case, reversible error.

Appellant correctly cites cases in this circuit in which we have condemned practices similar to that followed by Mayo. *See, e.g., United States v. Four Star,* 428 F.2d 1406, 1407 (9th Cir. 1970), *cert. denied,* 400 U.S. 947; *Reinke v. United States,* 405 F.2d 228 (9th Cir. 1968); *Coughlan v. United States,* 391 F.2d 371 (9th Cir.), *cert. denied,* 393 U.S. 870 (1968). We have not, however, reversed convictions where ethical violations on the prosecutor's part have appeared and an effective waiver of the accused's right to counsel has occurred. *See, United States v. Four Star, Reinke v. United States, Coughlan v. United States, supra.* The instant

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[8]ABA Disciplinary Rule 7-104 states:

A. During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

case is distinguishable from the above cases because Sykes was not an accused at the time of the government's contact with him. His conviction had already been affirmed on appeal and was pending on certiorari.

We need not, however, consider Sykes' status or whether he knowingly and intentionally waived his Sixth Amendment right to counsel in his contacts with Mayo and the FBI. For even if we assume that Sykes' Sixth Amendment right to counsel was violated, that right is a personal right, *Faretta v. California,* 422 U.S. 806 (1975), and its violation as to Sykes does not give Partin standing to challenge his conviction. *Cf. United States v. LePera,* 443 F.2d 810, 812 (9th Cir. 1971), *cert. denied,* 404 U.S. 958 (defendant lacked standing to assert coconspirator's constitutional privilege against self-incrimination). Furthermore, if Partin does not have standing to raise any possible violation of Sykes' Sixth Amendment right as grounds for reversal, it follows *a fortiori* that he does not have standing to raise a violation of an ethical duty of the prosecutor to Sykes as grounds for reversal of his conviction.

Partin's Right to Counsel

Sykes' testimony at Partin's trial as a government witness does raise the more serious question of whether Partin's Sixth Amendment right to the effective assistance of counsel was abridged. That right includes the right to be represented by counsel whose loyalties are undivided. *Glasser v. United States,* 315 U.S. 60 (1942); *Holloway v. Arkansas,* 435 U.S. 475 (1978); *United States v. Villarreal,* 554 F.2d 235, 236 (5th Cir. 1977), *cert. denied,* 434 U.S. 802.

When Sykes was called to the witness stand by the government, defense counsel McPherson expressed sur-

prise at Sykes' appearance as a government witness. McPherson told Judge Scott that he had a conflict since he was then representing Sykes in a petition for certiorari before the Supreme Court of the United States. McPherson moved for a mistrial in order to allow Partin to retain new counsel. Judge Scott recessed the trial at this point and held a hearing in chambers concerning this matter.

McPherson informed Judge Scott that he did not believe he would be able to effectively cross-examine Sykes on behalf of Partin because of Sykes' attorney-client privilege with him. Judge Scott then interviewed Sykes out of the presence of the Assistant United States Attorney and defense counsel. He determined that Sykes' desire to testify for the government was voluntary. He then explained the attorney-client privilege to Sykes. In response to this explanation and after discussing the nature of the privilege, Sykes said that McPherson could question him on anything. He waived his attorney-client privilege. McPherson and the Assistant United States Attorney returned and McPherson explained the attorney-client privilege to Sykes. Sykes again stated that McPherson could cross-examine him on anything and use anything he wanted to in his questioning "regardless of how he had learned it."

After Judge Scott returned to the bench, but in the absence of the jury prior to the resumption of the trial, Partin addressed the judge. He told the judge that he wanted a new attorney because he felt McPherson had a conflict of interest. Judge Scott denied the request. In denying the request, Judge Scott told Partin that he felt that the situation about which Partin was now complaining had occurred because Partin had chosen to ignore his earlier warning about the potential problems of multiple representation.

At the time of Sykes' direct testimony, McPherson was given copies of the two statements Sykes had made to the FBI. Prior to his cross-examination of Sykes and subsequent to the direct examination, McPherson interviewed Sykes. After the interview McPherson informed Judge Scott that he had had ample time to prepare his cross-examination and that he was ready to proceed. During McPherson's cross-examination of Sykes, he did not impeach the credibility of Sykes as a witness.

We have carefully reviewed the record in this case, including pertinent portions of earlier hearings and trials held in connection with the obstruction of justice indictment, and have concluded that Partin was not denied his Sixth Amendment right to the effective assistance of counsel. In view of Judge Scott's 1974 warning to Partin and the appearance of codefendant Trantham as a government witness at Partin's second trial, we find that Partin knowingly and intelligently waived his right to counsel whose loyalties were undivided. Furthermore, we find that Judge Scott's inquiry at trial and the resulting relinquishment by Sykes of his attorney-client privilege, avoided the occurrence of any actual conflict of interest.

It is clear that a defendant may waive his right to assistance of counsel who is free from any conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Holloway v. Arkansas*, 435 U.S. 475, 483, n. 5 (1978). The Court in *Holloway* noted that the inquiry in *Glasser* into whether there had been a waiver confirmed that a defendant may waive this right. 435 U.S. at 483 n.5. Indeed, the Court stated, 435 U.S. at 482, that:

> Requiring or permitting a single attorney to represent codefendants, often referred to as joint

> representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation.

In considering whether Partin waived his right to the assistance of counsel free from any conflict of interest, it is necessary to consider the "facts and circumstances surrounding . . . [this] case, including the background, experience and conduct of" Partin. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Partin was familiar with his constitutional right to the assistance of counsel unimpaired by any conflict of interest. As discussed above, Judge Scott had quite properly held a hearing in May 1974 in which he informed Partin and the other codefendants of the risks of multiple representation and the importance of their Sixth Amendment right. Judge Scott advised them of their right to have counsel appointed if they could not afford to retain separate counsel. He determined that the codefendants had discussed the risks of multiple representation with their counsel. Prophetically, he also advised them of the conflict of interest which could be caused by one codefendant testifying against another.

We note that Judge Scott's inquiry and warning is the type suggested by proposed Federal Rules of Criminal Procedure, Rule 44(c). That rule states in pertinent part that in cases of joint or multiple representation "the court shall promptly inquire with respect to each joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." *Preliminary Draft of Proposed Amendments to the*

Federal Rules of Criminal Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (February 1978). *See, also, Kaplan v. United States*, 375 F.2d 895 (9th Cir. 1967), *cert. denied*, 389 U.S. 839 (requiring such a hearing where there is some indication of a possibility of conflict of interest occurring).

Partin was also familiar with the importance of counsel in our criminal justice system on a firsthand basis. The indictment under which Partin was tried grew out of two earlier criminal cases in which Partin was a defendant. In the course of those two cases he stood trial three times. See *United States v. Partin, supra.* Prior to those two criminal cases Partin was a defendant in a number of prosecutions in the early 1960's. *See: Hoffa v. United States*, 385 U.S. 293, 297-98 (1966). We have taken notice of Partin's prior involvement in criminal cases as a defendant solely in connection with his ability to appreciate Judge Scott's 1974 admonition concerning the risks of multiple representation and the importance of the effective assistance of counsel. We note that Partin was never convicted in those previous criminal cases, other than the convictions which were reversed.

If the conflict of interest problem which Partin raises on appeal had been a completely unknown contingency prior to his trial, we might be reluctant to find a waiver of his right to counsel free from conflict of interest solely on the basis of Judge Scott's 1974 warning. To do so might force a defendant to waive his right to object to unknown problems at his trial. In this case, however, Partin was aware of the possibility that a codefendant, represented by McPherson, would testify as a government witness at his trial.

At Partin's second trial, when he was not represented by McPherson, one of the government witnesses was Ben Trantham, a codefendant who was represented by McPherson. The problem of a codefendant testifying against him, which Judge Scott had cautioned him about, had occurred. Despite this knowledge, Partin retained McPherson to represent him at his third trial. The fact that Sykes, not Trantham, testified at the third trial does not change the fact that the type of conflict which occurred was known prior to trial bv both Partin and McPherson, who had reviewed the record of the earlier trial in preparation for trial.

In *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271 (8th Cir. 1970), the defendant dismissed court-appointed counsel and retained the attorney who was representing his codefendants. The Eighth Circuit said that action alone was not sufficient to constitute a waiver of the defendant's right to the assistance of effective counsel. To constitute waiver the defendant would have to know of the conflict at the time he retained the attorney, the court said. 425 F.2d at 279-280. Here Partin knew of the conflict when he retained McPherson. In *United States v. Frame*, 454 F.2d 1136 (9th Cir. 1972), *cert. denied*, 406 U.S. 925, we stated that once a defendant exercises "his right to retain counsel after being informed of the possible conflict and its consequences" he has waived "any subsequent claim based upon the alleged conflict." 454 F.2d at 1138.

Partin's decision to retain McPherson for his third trial after he had been warned of the risks inherent in multiple representation and after he had seen one of his codefendants represented by McPherson testify at his second trial, demonstrates a knowing and intelligent

waiver of his right to representation free from conflict of interest.

Even if Partin had not waived this Sixth Amendment right, the testimony of Sykes did not result in a conflict of interest for McPherson. In *Holloway v. Arkansas, supra*, the Court held that, although joint representation of codefendants is not *per se* violative of constitutional guarantees of effective assistance of counsel, when a trial court is informed in a *timely* manner of the possibility of a conflict of interest, the court must appoint separate counsel unless it ascertains that the possibility is too remote to warrant such a step. 435 U.S. at 485-486. The Court also addressed the problem of a defense counsel's untimely motion for separate counsel.

> The State has an obvious interest in avoiding such abuses [defense counsel seeking to delay trials by untimely motions]. . . . When an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics (citations omitted). *Nor does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests*. . . . (emphasis supplied)

435 U.S. at 486-87.

The hearing which Judge Scott conducted at Partin's trial, in order to determine the nature of McPherson's motion for a mistrial, was an appropriate response to McPherson's untimely motion.[9] Judge Scott determined

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[9] In view of McPherson's and Partin's knowledge of Trantham's appearance at Partin's second trial, this motion can only be characterized as untimely.

that the basis of the motion was McPherson's belief that he would be unable to cross-examine Sykes because of the attorney-client privilege Sykes possessed.

Once Sykes waived his attorney-client privilege the conflict which concerned McPherson was eliminated. The privilege was not McPherson's but Sykes'. *See, e.g., United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (the Court noted that where an attorney-client privilege existed, it was the witness, not the attorney who must object to the cross-examination).

In *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978), a codefendant testifying against one of the appellants, Arroyo-Ayala, was represented by Arroyo-Ayala's attorney. The testifying codefendant refused to waive any conflict of interest claim and the attorney was unable to cross-examine him. We upheld the trial court's decision that required Arroyo-Ayala to be represented by separate counsel. Contrary to the codefendant in *Vargas-Martinez*, Sykes waived the attorney-client privilege and there was no need to declare a mistrial in order for Partin to retain new counsel.

Partin, however, points to McPherson's failure to impeach Sykes' credibility during cross-examination as demonstrating a conflict of interest. This is the only specific aspect of McPherson's representation which Partin points to on appeal. An examination of the record indicates that the reason the scope of Sykes' cross-examination was limited was because McPherson did not wish Sykes' conviction on Count II of the same indictment under which Partin was being tried to come to the attention of the jury. Moreover, McPherson's associate counsel could have conducted this examination.

At the beginning of the trial McPherson asked Assistant United States Attorney Mayo if he planned to bring out the prior convictions of any of Partin's codefendants who would testify at trial (two codefendants not represented by McPherson also testified at the trial). Mayo responded that in accordance with the court's ruling at Partin's first trial, he would bring out the witnesses' convictions if their credibility was attacked.

By not attacking Sykes' credibility, McPherson avoided bringing to the attention of the jury the fact that one of Partin's coconspirators had been found guilty of the same conspiracy he was charged with on Count II. McPherson's cross-examination of codefendant Jack Gremillion, Jr., who had pled guilty to Count II, was limited in the same manner as his cross-examination of Sykes. The other codefendant, Jerry Millican, had not been convicted; his testimony is the subject of the witness security program jury instruction, *infra*.

In a case such as this when the trial judge made an inquiry into the multiple representation of codefendants by defense counsel and warned the codefendants of the dangers of such representation, and where the defense counsel and the defendant were aware of the possibility of a conflict of interest occurring, the defendant bears the burden of demonstrating that specific prejudice has resulted to him from the alleged conflict of interest. *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977). Appellant Partin has not met that burden.

Witness Security Program Jury Instruction

The government's last witness was Jerry Millican, a former codefendant of Partin's who had not been convicted. Millican was participating in the witness

security program. In the course of his direct testimony the judge gave an instruction to the jury concerning the witness security program. This instruction was given at the request of the government in order to disclose to the jury, on direct examination, information that could damage the witness' credibility. The defense has a right to show that a witness, while in the program, has received substantial benefits. *United States v. Partin*, 552 F.2d at 645.

After the instruction was given, defense counsel moved for a mistrial and stated in appellant's brief, "the defense had believed the judge was only going to charge that this was a legitimate program authorized by Congress and, instead, the jury was told that the Attorney General had made a determination that Millican's life had been threatened." If such an instruction had been given, it could perhaps be prejudicial to Partin. The instruction, however, does not state that the Attorney General must believe that the witness is threatened.

The particular sentence of the instruction which is objected to states: "[The witness] must satisfy the Attorney General that he is a necessary witness in a case and that he has reason to believe that his wellbeing is in danger, his life or wellbeing, that he is threatened in some way."[10] The instruction informs the jury that

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[10]The entire instruction states:

Ladies and Gentlemen, you have just heard something mentioned called the witness security program, and the Court wants to give you this instruction in connection with that and tell you what a witness security program is. A witness must qualify before he is able to enroll in the

[footnote continued]

the witness must satisfy the Attorney General that *the witness* believes he is threatened. Nonetheless, as the Fifth Circuit noted in *United States v. Partin, supra*, an instruction regarding the witness security program must "be handled delicately," 552 F.2d at 645, but the Fifth Circuit also recognized the fact that the risk involved may be to some extent unavoidable.

Although the sentence quoted above was not contained in the instruction approved by the Fifth Circuit in *United States v. Partin, supra*, it is a correct

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program. And when he is enrolled he is given a certain amount of money. It is not salary—excuse me, I will start again. This is an attempt of the Court to instruct you what the witness security program is. It is a program under which this witness has lived in the past. The witness must qualify before he is able to be enrolled in that program. And when he is enrolled he is given a certain amount of money. It is not salary, it is just a gratuity in lieu of salary to allow him to live in the place where he is assigned to live. And he is assigned to the place and he is under the custody of the United States Marshal Service. Only a few—only one or two persons, that is, in that service, actually know where the witness is, the man who is actually in charge of him on the spot and one person higher up in the department. He is assigned a place to live. His identity is totally concealed. He has to assume a name. He is not at liberty, but is allowed to work. I think for a practical matter it is very hard for him to work because he cannot identify himself or his background. And to qualify to get on this program he must certify, I mean he must satisfy the Attorney General that he is a necessary witness in a case and that he has reason to believe that his well-being, is in danger, his life or wellbeing, that he is threatened in some way. And if he fulfills those two qualifications he may or may not be put on the witness security program. And the main thing is, the main effect is that no one, not just the public, but even his closest associates, former associates, have no idea where he is or where his whereabouts are. They cannot get in touch with him.

statement of the law. It refers to the possibility of a threat but does not tell the jury that the Attorney General has concluded that there was a threat or who may have made the threat if there was one. The instruction is fair to the government in that it explains why the witness is receiving government money. Indeed, the cross-examination of Millican emphasized the government payments he received as a means of attacking his credibility. The defense again emphasized the government payments to the witness during closing argument. Judge Scott did not give a witness security program instruction at the close of the trial, nor was he requested to do so by the defendant, although the government urged, unsuccessfully, that the witness security instruction should be repeated.

In view of the emphasis by the defense on the government payments received by Millican, the instruction properly explained information to the jury which concerned the witness' credibility. Furthermore, in view of all of the evidence presented by the prosecutor, this instruction cannot be said to have tilted the jury toward a verdict of guilty.

Appellant also argues that the trial court erred in giving the instruction without a copy of it having been furnished to defense counsel. Appellant relies on Federal Rules of Criminal Procedure, Rule 30. Appellant's argument is incorrect; Rule 30 applies to final instructions given to a jury, not to instructions given during trial unless a written request for such instruction was tendered which, in this case, it was not. The very wording of Rule 30 adequately demonstrates that this was not intended to apply to cautionary instructions given during trial proceedings.

Judge Scott's Refusal to Recuse Himself

Appellant argues that Judge Scott should have recused himself because he had presided at the trials of all of the codefendants in this case. This exact same question has been decided in a case involving Partin's codefendants and Judge Scott. *United States v. Partin, supra* at 636-39. We agree with the Fifth Circuit that Judge Scott did not err in failing to recuse himself. Appellant has alleged no bias on the part of Judge Scott, nor did he comply with the requirements of 28 U.S.C. §§144 or 455. The recusal motion was properly denied. *United States v. Anderson*, 561 F.2d 1301, 1303 (9th Cir. 1977), *cert. denied*, 434 U.S. 943.

We conclude that an overall view of the entire trial convincingly demonstrates that Partin had a fair trial.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERCIA, Plaintiff-Appellee,	)	
v.	)	No. 77-3853
EDWARD GRADY PARTIN, Defendant-Appellant.	)	

Before TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge

ORDER

The panel as constituted in the above case has voted to deny the motion for reconsideration. Judges Trask and Wallace have voted to reject the suggestion for rehearing en banc. Judge Hoffman does not vote on the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The motion for reconsideration is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Walter E. Hoffman, Senior United States District Judge, for the Eastern District of Virginia, sitting by designation.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-229

EDWARD GRADY PARTIN,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 19, 1979.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of September, 1979.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	No. 77-3853
vs.	)	
	)	O R D E R
EDWARD GRADY PARTIN, Defendant-Appellant.	)	

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN*, District Judge

Upon the votes of Judges Trask and Hoffman to deny the motion, the motion for clarification of the opinion filed by the United States is denied as moot.

/s/ Ozell M. Trask
United States Circuit Judge

*Honorable Walter E. Hoffman, Senior United States District Judge, for the Eastern District of Virginia, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	No. 77-3853
vs.	)	
	)	O R D E R
EDWARD GRADY PARTIN, Defendant-Appellant.	)	

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN*, District Judge

The motion for remand filed by defendant-appellant is denied.

/s/ Ozell M. Trask
United States Circuit Judge

*Honorable Walter E. Hoffman, Senior United States District Judge, for the Eastern District of Virginia, sitting by designation.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	No. 77-3853
vs.	)	
	)	ORDER
EDWARD GRADY PARTIN, Defendant-Appellant.	)	

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN, District Judge

Because views of judges crossed in the mails, and thus did not clearly reflect their judgment, the panel herewith *sua sponte* amends the Order filed August 10, 1979, to read as follows:

> "The motion for remand filed by defendant-appellant is denied without prejudice to resubmission of said motion for new trial based upon after-discovered evidence to the district court in the event the district court is inclined to grant a new trial and issues a certificate to that effect. *United States v. Phillips*, 558 F.2d 363 (6th Cir. 1977). *See also*, Rule 33, Fed. R. Crim. P."

No. 79-646

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD GRADY PARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDWARD GRADY PARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 601 F.2d 1000.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979. A petition for rehearing was denied on August 27, 1979. Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to October 19, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's representation by an attorney who also represented a former co-defendant denied petitioner the effective assistance of counsel when the former co-defendant testified against petitioner after waiving his attorney-client privilege.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on three counts of conspiring to obstruct justice, in violation of 18 U.S.C. 371 and 1503. He was sentenced to concurrent terms of four years' imprisonment on Counts I and III and a consecutive term of four years on Count II. The court of appeals affirmed (Pet. App. A).

1. On October 4, 1973, a three-count indictment was filed in the Middle District of Louisiana charging petitioner, Harold Sykes, Ben Trantham, and nine others with conspiring to change the testimony of witnesses and to prevent witnesses from testifying in connection with two previous cases in which petitioner was a defendant.[1] The trial that is the subject of the instant petition, held in San Diego, California as a result of a transfer motion, was petitioner's third trial under this indictment.

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[1] The history of the earlier cases and the genesis of the instant prosecution are set forth in *United States* v. *Partin*, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

Petitioner, who was tried separately from the other defendants, retained James McPherson as his attorney at his first and third trials. McPherson was also retained by seven other co-defendants, including Harold Sykes and Ben Trantham, both of whom were named in Count II of the indictment and were convicted at a separate trial.[2]

In May 1974, before any of the co-defendants had come to trial, the government filed a motion requesting that the trial judge hold a hearing regarding the representation of eight of the co-defendants by the same attorney. The government was concerned that such multiple representation might create a conflict of interest for attorney McPherson and deprive defendants of their Sixth Amendment right to effective assistance of counsel. At a hearing attended by all of the co-defendants and attorney McPherson, United States District Judge Nauman Scott[3] questioned McPherson about his representation of multiple defendants. McPherson informed Judge Scott that he had discussed the case with his clients and was satisfied that there was no conflict of inter-

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[2] Sykes and Trantham were first tried and convicted in August 1974. Their convictions were reversed and remanded on June 17, 1975. *United States* v. *Marionneaux*, 514 F.2d 1244 (5th Cir. 1975), cert. denied, 434 U.S. 903 (1977). In July 1975, Sykes and Trantham were again tried and convicted, and their convictions were affirmed on appeal. *United States* v. *Partin, supra.* Sykes then petitioned for a writ of certiorari, No. 77-34, which was denied on October 17, 1977, several weeks after petitioner's third trial was concluded. *Partin* v. *United States*, 434 U.S. 903 (1977).

[3] Judge Scott presided at all three of petitioner's trials.

est. McPherson also stated that he had discussed with his clients the possibility of unforeseen conflicts that might arise in the course of the proceedings and that his clients still wished to be represented by him, even though they understood that there might be conflict of interest problems in that representation (Pet. App. 3a-4a).

After questioning McPherson, Judge Scott addressed each defendant and advised him of the importance of his Sixth Amendment right to the effective assistance of counsel and, in particular, of his right to be represented by counsel who was free of any conflict of interest. He informed the defendants of the potential problems of multiple representation and specifically of the problems that could arise if one defendant testified against another. He advised them that if they could not afford separate counsel, the court would appoint counsel for them. He asked them if there were any questions; there were none. Judge Scott then told all defendants to contact the clerk of the court in Baton Rouge, Louisiana, if they wished to have counsel appointed for them.[4] No defendant responded to the invitation.

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[4] The pertinent portion of Judge Scott's advice to the co-defendants was as follows (Pet. App. 4a-5a n.5):

> Counsel whom you have retained in this matter; that is, Mr. McPherson and Mr. Atkins, have advised me that they have discussed the question of conflict of interest with you and that each of them is satisfied in his own professional judgment that there is no conflict of interest with respect to the charges against each of you and the defenses that might be asserted with regard to those charges. In addition, each has informed me that he had discussed with you the questions which may arise in the future and the possibility, although there appear to be no conflicts of interest now, it might develop at a later date that one or more of you may have different interests from the other. I do not mean to question the judgment of either of them in this regard, I do want, however, to advise you to think carefully about this matter, about what is in your own best interest, and about your constitutional rights. Let us assume a different kind of charge. Let us assume that two people are charged with robbing a bank and are being tried jointly. Let's assume they are both being represented by the same lawyer. It might happen during the course of that trial that one of the persons charged with the crime might want to change his defenses in the middle of the trial. He might want to take the witness stand and testify that the other person in some way forced him to participate in the bank robbery. If that happened in the case of the two bank robbers, and if they were both represented by the same lawyer, obviously one would have a different interest from the other and the lawyer would have a conflict of interest. If one defendant could take the witness stand and begin to testify against his co-defendant he might end up being acquitted, but he would undoubtedly add to the evidence against the co-defendants . . . . I simply want to advise that if you think that you have a lawyer who has or may have a conflict of interest, and if you wish to change counsel, the Court will appoint another counsel to represent you. Any person who is not able; that is, financially not able to afford a lawyer, can have a lawyer appointed for him without charge . . . . If however, you are satisfied with your present counsel and you are satisfied to run any risks that may hereafter develop of a possible conflict of interest, you certainly

Petitioner's first trial (and that of two co-defendants) commenced on November 13, 1974, but ended in a mistrial after the first day. The trial of

the two-codefendants was then severed from petitioner's trial.

2. Petitioner's second trial, in February and March of 1975, resulted in a conviction on all three counts charged in the indictment. Attorney McPherson did not represent petitioner at this trial. One of petitioner's co-defendants, Ben Trantham, testified against petitioner. Trantham was appealing his conviction on Count II of the indictment at the time of his testimony. Trantham had been represented by McPherson at his trial and was being represented by him on appeal. Petitioner's conviction at his second trial was reversed in May 1977. *United States* v. *Partin*, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

3. Before petitioner's third trial commenced and several months after Harold Sykes' conviction was affirmed on appeal (*ibid.*), Sykes called the Assistant United States Attorney in charge of the trials of petitioner and his co-defendants and told him that he wished to cooperate with the government (Tr. 296). At the time, McPherson was representing Sykes in connection with a pending petition for a writ of certiorari to review the Fifth Circuit deci-

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have the right to do this . . . . Now, if anyone has any questions they would like to ask me about this? All right. . . .

I would, however, say that if you wish other counsel I would like—well, I will give you a chance to think about it and if you wish other counsel, you may contact the Clerk of the Court here in Baton Rouge and make such a request on or before ten days from this date.

sion affirming his conviction.[5] Sykes told the prosecutor that he believed that attorney McPherson considered petitioner's interests to be paramount to his and that McPherson had thrown him and other co-defendants "to the dogs" in order to save petitioner (Tr. 296, 305-306). Sykes requested that his cooperation be kept a secret because he feared for his safety if his cooperation became known (Tr. 296, 312-313). Sykes subsequently gave two statements to the FBI prior to petitioner's trial (Tr. 296, 311-312).

Pursuant to Sykes' request, the prosecutor did not inform McPherson of Sykes' cooperation, but he did inform the trial court that Sykes had given a statement and would be a government witness at trial (Tr. 296, 310-311).[6] In addition, the government advised McPherson prior to trial that writs of *habeas corpus ad testificandum* had been issued to Harold Sykes and two other of petitioner's convicted co-defendants (also represented by McPherson) to secure their presence at trial (G. Br. 29 & n.9; see also R. 42 [docket entry]).[7]

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[5] Sykes originally retained McPherson to represent him. After his first trial and appeal, he was no longer able to afford counsel, and McPherson was appointed to represent him.

[6] At trial, Judge Scott did not remember the prosecutor's advising him that Sykes would be a government witness, but stated that he was sure the prosecutor had done so (Tr. 310).

[7] On motion of the government, copies of these writs were included in the record on appeal. "G. Br." refers to the government's brief on appeal.

Petitioner's third trial was held between September 26 and October 4, 1977, several weeks before this Court denied Sykes' petition for a writ of certiorari. He was represented at the trial by McPherson and by John Mitchell, who served as local counsel (Tr. 72).

When the government called Sykes as a witness at trial, Judge Scott recessed the proceedings and held a hearing in chambers concerning the matter (Tr. 297). McPherson informed Judge Scott that he had a conflict of interest because he was representing Sykes in a petition for a writ of certiorari; he stated that due to his attorney-client relationship with Sykes, he would be unable to cross-examine Sykes effectively (Tr. 298, 300). Judge Scott then interviewed Sykes outside the presence of the prosecutor and defense counsel in order to determine whether Sykes wished to confer with McPherson before testifying (Tr. 302). Sykes informed the court that he did not wish to do so (Tr. 304).

Following Judge Scott's interview with Sykes, McPherson moved for a mistrial in order to afford petitioner an opportunity to retain new counsel who would be free to cross-examine Sykes (Tr. 308). Judge Scott denied the motion, noting that McPherson's motion came with "poor grace'" in light of petitioner's insistence on retaining McPherson despite Judge Scott's earlier conversation with all the defendants concerning the possible disadvantages of multiple representation, and, in particular, the possibility that some of the defendants might later de-

cide to testify as government witnesses (Tr. 313-314). Judge Scott further stated that while McPherson could still represent petitioner at the trial, he felt that McPherson could no longer represent Sykes (Tr. 314); he suggested that Sykes formally discharge McPherson as his attorney (Tr. 316).

McPherson, although still urging a mistrial, stated that he did not believe it would be necessary for Sykes to discharge him as his attorney (Tr. 318). McPherson suggested that if Sykes waived the attorney-client privilege, he would be able to cross-examine Sykes effectively, and that such a procedure would resolve any ethical considerations (Tr. 314-318). Judge Scott called Sykes into chambers and in the presence of the prosecutor and defense counsel explained to him the attorney-client privilege and asked whether Sykes would be willing to waive the privilege (Tr. 320). McPherson also explained the privilege to Sykes, informing him that in order to represent petitioner, he (McPherson) would have to attack Sykes' credibility on cross-examination, and in doing so would have to use information Sykes had divulged to him during the attorney-client relationship (Tr. 321-323). Sykes stated that he understood and that he was willing to waive the privilege (Tr. 325). He further stated that McPherson could cross-examine him on any matter and could use on cross-examination any information obtained during the course of the attorney-client relationship (Tr. 324-325).

Prior to the resumption of the trial, petitioner addressed the judge, informing him that he wanted a

new attorney in light of the conflict of interest (Tr. 326-327). Judge Scott denied the request, stating that the situation about which petitioner was now complaining had occurred because petitioner had chosen to ignore his earlier warning about the potential problems of multiple representation (Tr. 327-328).

Sykes then testified on direct examination, admitting his guilt on Count II of the indictment and implicating petitioner (Tr. 328-363). Prior to cross-examination, McPherson interviewed Sykes. McPherson had been given copies of the two statements Sykes had made to the FBI (Tr. 366-367). After the interview McPherson informed Judge Scott that he had had ample time to prepare his cross-examination and that he was ready to proceed (Tr. 367). McPherson did not impeach Sykes' credibility during cross-examination (Tr. 368-370).

ARGUMENT

Petitioner claims that his Sixth Amendment right to the effective assistance of counsel was violated because his principal trial counsel was representing prosecution witness Harold Sykes in connection with a petition for a writ of certiorari and had represented Sykes at his separate trial and on appeal of his conviction on Count II of the instant indictment.

1. Citing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), and decisions by the Fifth Circuit, *Stephens* v. *United States*, 595 F.2d 1066 (5th Cir. 1979); *Zuck* v. *Alabama*, 588 F.2d 436 (5th Cir.), cert. denied, No. 78-1741 (Oct. 1, 1979); *Castillo* v. *Estelle*,

504 F.2d 1243 (5th Cir. 1974), the Seventh Circuit, *United States* v. *Jeffers*, 520 F.2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); *Zurita* v. *United States*, 410 F.2d 477 (7th Cir. 1969), and the District of Columbia Circuit, *Taylor* v. *United States*, 226 F.2d 337 (D.C. Cir. 1955), petitioner correctly states the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair (see Pet. 17-23). This rule is based on the premise that when one attorney is compelled to represent conflicting interests simultaneously, counsel may be restrained in the zeal of his representation of one or both of those interests and may therefore not render the effective assistance of counsel contemplated by the Sixth Amendment. See *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 482; *Glasser* v. *United States*, 315 U.S. 60, 70 (1972). However, nothing in those cases suggests that a trial judge is powerless to adopt measures—or to endorse measures approved by one of the clients—that will eliminate such restraints during a trial.[8]

In the instant case, the solution adopted by the court eliminated the only conflict that concerned defense counsel McPherson or posed any realistic threat to petitioner's interest in loyal representation by his attorney. Upon learning of the conflict of interest,

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[8] Indeed, proposed Rule 44(c) of the Federal Rules of Criminal Procedure states that "the court shall take such measures as may be appropriate to protect each defendant's right to counsel" in cases of joint representation.

the trial court held a hearing on the matter and determined that the basis for McPherson's motion for a mistrial was his belief that he would be unable to cross-examine Sykes effectively due to confidential disclosures that Sykes had made to him during the attorney-client relationship. The court then inquired of Sykes whether he would be willing to waive the attorney-client privilege, and Sykes agreed to do so.[9] This waiver eliminated the conflict of interest and made it possible for McPherson to cross-examine Sykes effectively. See *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978), in which a co-defendant testifying against one of the appellants was represented by the appellant's attorney. Although the testifying co-defendant there refused to waive the privilege, the court made clear that had he done so, the waiver would have eliminated the conflict of interest.

Petitioner nonetheless claims (Pet. 21-22) that Sykes' waiver of the privilege, which permitted McPherson to question Sykes without fear of divulging otherwise confidential communications, did not adequately free McPherson to cross-examine Sykes. Petitioner argues that McPherson continued to have a professional duty of individual loyalty to Sykes and had to consider, among other things, "the impact of effective cross-examination on his client-witness' hopes for benefits from the government in the future if cross-examination broke down the story the government relied on at trial" (Pet. 22). This claim is not persuasive. Before Sykes waived his privilege, both the court and McPherson carefully explained to him the consequences of such waiver, including the fact that it would allow McPherson to attack Sykes' credibility (Tr. 321-323). Sykes stated that he understood, and that McPherson could cross-examine him on anything he desired.

[9] Sykes' decision was, of course, consistent with his decision to cooperate with the government without notifying McPherson.

Thus, in waiving the privilege, Sykes not only agreed to the disclosure of otherwise privileged information, but he also agreed to relinquish his right to the loyalty of McPherson and to accept the consequences of a thorough attack on his credibility by a defense attorney, whether it be McPherson or another attorney, with all its attendant benefits and burdens. Petitioner cannot now claim that despite such waiver, McPherson still owed a duty to Sykes that he could not breach. The right to claim the protection of the attorney-client privilege and to demand attorney loyalty belonged to Sykes, not to McPherson. See, *e.g.*, *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). There is no indication that McPherson felt constrained in his cross-examination of Sykes by his prior attorney-client relationship with him. He had cited the possible use of privileged information as the reason he could not cross-examine Sykes (Tr. 314-315), and he was relieved of any obstacles the privilege might pose by Sykes' decision to waive it. The use of privileged information to impeach a client would, absent a waiver, constitute a rather obvious act of disloyalty to that client, and

McPherson must therefore have understood Sykes' waiver to free him from his obligations to Sykes in this regard as well.

Moreover, when the trial court was apprised of the conflict of interest, it suggested that McPherson would no longer be able to represent Sykes. McPherson, however, assured the court that that would not be necessary, stating (Tr. 318): "I don't think we have to go so far as to require Mr. Sykes to fire me. I think what he has to do before I can proceed on cross-examining him is to waive the attorney-client privilege. And if he does that then I think I am covered."

Absent McPherson's assurances that Sykes' waiver of the privilege would resolve McPherson's ethical dilemma and enable him to cross-examine Sykes effectively, the court might well have suggested that Sykes formally discharge McPherson. In light of Sykes' earlier statements that he felt McPherson had thrown him "to the dogs," it is inconceivable that Sykes would have objected to doing so, particularly because his conviction had already been affirmed by the Fifth Circuit, and McPherson's representation of him before this Court was dormant pending a decision on the petition for a writ of certiorari. Thus, under these circumstances, Sykes' decision to waive the attorney-client privilege and to permit McPherson to cross-examine him in any manner he chose was the practical equivalent of discharging McPherson as his attorney, and his failure to do so formally is of no moment—especially given McPherson's own

representation that waiver of the attorney-client privilege eliminated any obstacle to thorough and effective representation of petitioner.

2. Further, where, as here, the trial court had made an inquiry into the multiple representation of co-defendants by the same attorney and warned the co-defendants of the dangers of such representation, and where the defense counsel and petitioner were aware of the possibility of a conflict of interest arising but nevertheless insisted on proceeding with the joint representation, petitioner bears the burden of demonstrating that specific prejudice has resulted to him from the alleged conflict of interest. See *Solomon* v. *LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1979); *United States* v. *Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977); *United States* v. *Carrigan*, 543 F.2d 1053, 1055-1056 (2d Cir. 1976).[10] The requirement that prejudice be shown is especially appropriate here, where the trial court took reasonable measures to

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[10] Petitioner claims (Pet. 27-29) that under *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 487-491, "wherever a trial court improperly requires joint representation over timely objection reversal is automatic" absent any showing of specific prejudice. As demonstrated above, however, not only was petitioner's objection untimely, but the trial court acted properly in requiring McPherson's continued representation of petitioner once Sykes had waived his attorney-client privilege and agreed to permit McPherson to cross-examine him. Nothing in *Holloway* disturbs the settled principle that when the trial court makes a proper inquiry into the multiple representation of co-defendants, advises them of the risks involved, and offers to provide independent counsel, the defendant has the burden of demonstrating specific prejudice.

eliminate any conflict of interest when that possibility later surfaced. Petitioner has not met that burden.

Petitioner claims (Pet. 28-29) that specific prejudice is sufficiently demonstrated by the fact that although Sykes was extremely vulnerable to cross-examination, being an alcoholic and a convicted felon, McPherson failed to attack his credibility.[11] The record clearly shows, however, that McPherson limited his cross-examination of Sykes because he did not wish Sykes' conviction on Count II of the same indictment under which petitioner was being tried to come to the attention of the jury.

At the beginning of the trial, McPherson asked the prosecutor whether he planned to bring out the prior convictions of any of petitioner's co-defendants who would testify at trial (Tr. 36). The prosecutor informed him that, in accordance with the court's ruling at petitioner's first trial, he would bring out the witnesses' convictions if their credibility was attacked (Tr. 36). Thus, by not attacking Sykes' credibility, McPherson avoided bringing to the attention of the jury the fact that one of petitioner's co-conspirators had been found guilty of the same conspiracy with which petitioner was charged in Count II of the

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[11] We note that McPherson alerted the jury to Sykes' character during his opening statement, when he remarked (Tr. 112): "Harold Sykes drinks constantly. He is not as bad as Roberson, but when Harold gets a few drinks he gets kind of wild and he goes on two or three week drunks himself. And there was a big drunk that took place during the time of the Houston trial * * *."

indictment. McPherson's cross-examination of co-defendant Jack Gremillion, Jr., who had pled guilty to Count II, was limited in the same manner as his cross-examination of Sykes. Indeed, following McPherson's cross-examination of Gremillion, the prosecutor informed the court (Tr. 284-286) that he believed McPherson's questioning of Gremillion had laid a sufficient foundation for the government to bring out on redirect examination the fact of Gremillion's conviction on Count II. McPherson and co-counsel Mitchell strenuously objected to the admission of such evidence on the ground that its prejudicial effect would outweigh its probative value (Tr. 284-285, 289). The court sustained defense counsel's objections (Tr. 291).

Again, shortly before the close of the government's case, the prosecutor informed the court that he expected petitioner to testify and requested the court to issue a restrictive order to prevent petitioner from impugning the character of several government witnesses, including Gremillion and Harold Sykes (Tr. 1178-1181, 1184). The prosecutor stated that if petitioner attacked the character of the government witnesses, the government would return the witnesses to the stand and bring out their convictions (Tr. 1186). McPherson agreed to warn petitioner that he could not attack the character of the government's witnesses (Tr. 1193). In these circumstances, it is patently obvious that McPherson refrained from attacking Sykes' credibility on cross-examination in

order to prevent the jury from learning of Sykes' conviction on Count II.

3. In any event, we believe that petitioner waived his right to the assistance of an attorney whose loyalty is not divided between clients with conflicting interests. It is well established that the right to separate counsel, or to any counsel at all, may be waived. *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 483, n.5; *Glasser* v. *United States*, 315 U.S. 60, 70 (1942); *United States* v. *Lawriw*, 568 F.2d 98, 104-105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); *United States* v. *Duklewski*, 567 F.2d 255, 257 (4th Cir. 1977); *United States* v. *Garcia*, 517 F.2d 272, 275-276 (5th Cir. 1975); *Lollar* v. *United States*, 376 F.2d 243, 244 (D.C. Cir. 1967); cf. *Faretta* v. *California*, 422 U.S. 806, 807 (1975). Whether there has been such a waiver depends upon "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

Judge Scott's warnings in May 1974, before any of the defendants had come to trial,[12] clearly alerted petitioner to the risks inherent in multiple representation, and, in particular, of the conflict of interest

[12] Judge Scott's inquiry and warning is the type suggested by Rule 44(c) of the proposed amendment to the Federal Rules of Criminal Procedure. That proposed rule states in pertinent part that in cases of joint or multiple representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."

which could be caused by one co-defendant testifying against another.[13] There is no doubt of petitioner's ability to appreciate these warnings concerning the importance of the effective assistance of counsel. The indictment under which petitioner was tried grew out of two earlier cases in which petitioner was a defendant. In the course of those two cases he stood trial three times. See *United States* v. *Partin*, *supra*. Moreover, prior to those two criminal cases petitioner was a defendant in a number of prosecutions in the early 1960's. See *Hoffa* v. *United States*, 385 U.S. 293, 297-298 (1966).[14]

[13] Citing *Schram* v. *Cupp*, 436 F.2d 692, 695 (9th Cir. 1970), petitioner claims (Pet. 26) that the March 1974 hearing alone could not provide a basis for a valid holding of "waiver," since the warnings given at that time were not "reasonably contemporaneous" with the asserted waiver. The instant situation differs dramatically from that in *Schram*. There, the court held that the fact that an indigent defendant had been advised of his right to counsel in a prior case in which he was a defendant did not constitute a waiver of the right to counsel in an entirely different criminal proceeding arising four years later. Here, by contrast, the warnings given petitioner pertained to his right to independent counsel at an earlier trial in the same case. Moreover, unlike the indigent defendant in *Schram*, the record here clearly shows that despite the time lapse between the warnings and petitioner's third trial, petitioner was capable of fully appreciating such warnings.

[14] That counsel was retained rather than appointed supports the conclusion that petitioner's decision to continue with the representation was a knowing and voluntary one. *United States* v. *Gaines*, 529 F.2d 1038, 1043 n.3 (7th Cir. 1976); *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 n.5 (8th Cir. 1970).

Nor was the conflict of interest problem that petitioner raises an unknown contingency at this trial. At petitioner's second trial, when he was not represented by McPherson, one of the government witnesses was Ben Trantham, a co-defendant who was represented by McPherson. Despite this knowledge, petitioner retained McPherson to represent him at his third trial.[15] What is more, McPherson was advised

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[15] Petitioner argues (Pet. 24-25), in effect, that his decision to retain McPherson despite the court's earlier warnings of the possibility of a co-defendant testifying against him did not constitute a waiver because he did not know that Sykes, in fact, would so testify. We do not believe that petitioner's waiver was any less effective simply because he did not know which co-defendant, if any, might testify for the government. In electing to retain McPherson, he accepted the precise risk of which the court had apprised him—namely, that a co-defendant represented by McPherson might testify against him. Clearly, a defendant can waive not only existing conflicts, but also possible conflicts to which he has been alerted. See, *e.g.*, *United States* v. *Villarreal*, 554 F.2d 235, 236 (5th Cir.), cert. dismissed, 434 U.S. 802 (1977); *Hayman* v. *United States*, 205 F.2d 891, 895 (9th Cir.), cert. denied, 346 U.S. 860 (1953). The possibility of such an occurrence was amply brought home to petitioner when Ben Trantham testified against petitioner at his second trial. Indeed, on the first day of petitioner's third trial, the prosecutor informed petitioner and McPherson that because Trantham, now dead, was no longer available as a witness, he might introduce into evidence Trantham's testimony from the preceding trial (Tr. 31-34). Neither petitioner nor McPherson voiced any objections to such procedure on the ground that McPherson's ability to attack the credibility of Trantham's testimony (pursuant to Rule 806 of the Federal Rules of Evidence) would be impaired by any conflict of interest arising from McPherson's continuing duty to protect information learned from Trantham during the attorney-client relationship. See 8 J. Wigmore, *Evidence* § 2324 (1961 ed.) (attorney client privilege continues even after the death of the client).

by the prosecutor *prior to trial* that the government had issued writs of *habeas corpus ad testificandum* to Harold Sykes and two other convicted co-defendants, yet McPherson neither advised the court nor took any other steps to resolve a potential conflict of interest problem that would result if Sykes in fact testified. This reinforces the conclusion that petitioner knowingly waived his right to the assistance of counsel free from any conflict of interest.

4. Finally, petitioner contends (Pet. 15, 24, 28 n.13) that reversal is required because the conflict of interest arose as a result of the government attorney's misconduct in not notifying McPherson of his contacts with Sykes, and that such contact violated Disciplinary Rule 7-104 of the American Bar Association Code of Professional Responsibility. That rule provides that a lawyer representing a client shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer without the lawyer's consent, unless he is "authorized by law to do so." The court of appeals found (Pet. App. 8a-9a) that the prosecutor's conduct constituted an ethical violation. The court indicated, however, that Sykes' status under the Disciplinary Rule may have been different because he was no longer an accused, his conviction having been affirmed on appeal. But beyond this, the court held that petitioner did not

have standing to assert a violation of an ethical standard—or even a Sixth Amendment violation—affecting *Sykes'* relationship with his lawyer.

We think it plain that petitioner does not have standing to raise a constitutional or ethical challenge to the prosecutor's conversing with Sykes without the knowledge of Sykes' counsel. We also agree with the court of appeals that DR 7-104 is of marginal relevance where the defendant's conviction has been affirmed on appeal and the only remaining stage of the case is a pending petition for a writ of certiorari. These considerations suffice to dispose of this aspect of petitioner's arguments. But in any event, it is our view that the prosecutor's conduct was not unethical under the circumstances of this case.[16]

Sykes contacted the Assistant United States Attorney and offered his cooperation. The initiative did not come from the government. It is clear that a defendant may waive his Sixth Amendment right to the assistance of counsel without notice to his counsel. *Brewer* v. *Williams*, 430 U.S. 387, 405-406 (1977). It is equally clear that Sykes had a constitutional right to act on his own behalf in communicating with the government under the circumstances here presented.

[16] DR 7-104 appears to have been formulated with civil cases in mind, and it is by no means clear that it should be deemed to have general application to criminal cases, in which contacts between the government and the defendant in the absence of counsel are already to a considerable extent regulated by the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964). In any event, we are satisfied that it should not apply in circumstances such as those of the instant case.

Faretta v. *California*, 422 U.S. 806 (1975). A lawyer for the government cannot be thought to commit an ethical violation when he respects the wishes of an individual to exercise his constitutional right to represent himself in dealings with the government.[17] The constitutional right of a defendant to communicate directly with the government official responsible for his fate would be of little value if that official were ethically bound to decline to listen. Thus, the communications between Sykes and the prosecutor, at Sykes' initiative, were "authorized by law" within the meaning of the exception to DR 7-104 of the ABA Code.

Moreover, Sykes insisted that the prosecutor inform no one of his cooperation because he feared for his safety. The prosecutor respected this request. He did, however, inform the court of what Sykes had told him (Tr. 310). Further, McPherson did not object to the fact that the prosecutor had not told him of his conversations with Sykes. McPherson said: "* * * I can understand why [the prosecutor] honored that request, *as he should have*, and as he obviously did" (Tr. 307) (emphasis added). Indeed, the trial court found (Tr. 313) that for the prosecutor to have disclosed the fact of his conversations with Sykes would have constituted a breach of his agreement with Sykes. And, finally, the prosecutor advised McPherson prior to trial that he had issued

[17] Sykes signed a waiver of his right to the assistance of counsel when he gave his two statements to the FBI prior to petitioner's trial (Pet. App. 7a).

writs of *habeas corpus ad testificandum* to Sykes as well as two other co-defendants. McPherson was therefore on notice that his client might be called. Under these circumstances, there was clearly no ethical violation. Cf. *United States* v. *Crook*, 502 F.2d 1378, 1380-1381 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975); *Moore* v. *Wolf*, 495 F.2d 35, 37 (8th Cir. 1974); *United States* v. *Masullo*, 489 F.2d 217, 222-224 (2d Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-646

EDWARD GRADY PARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In our Petition, we urged this Court to grant certiorari for two reasons. *First*, the rulings of the lower court in this case on the existence of an "actual conflict of interest," the locus of the burden of showing "specific prejudice," and the existence of that prejudice on this record all conflict with rulings of other circuits as well as controlling principles from this Court's decisions. *Second*, the case poses basic constitutional and ethical issues going to the very heart of the administration of

federal criminal justice in the adversary system and the appropriate behavior of judges and lawyers in that system.

The twenty-four page Brief in Opposition demonstrates the validity of the reasons we advanced for granting plenary review in this case. Thus, respecting the cases we cited to demonstrate conflicts among the circuits, the Brief in Opposition makes no genuine effort to distinguish these contrary rulings. Indeed, the government takes express note of the cases cited in our petition on the "actual conflict" issue and observes ". . . petitioner correctly states the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair (*See* Pet. 17-23)." Br. in Opp. 11. Respecting the "waiver" and "prejudice" issues, the government simply ignores the squarely conflicting holdings in cases such as *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979), *Stephens v. United States*, 595 F.2d 1066, 1067 (5th Cir. 1979), and *People v. Stoval*, 40 Ill. 2d 109, 113-14, 293 N.E.2d 441, 444 (1968), discussed in our Petition at pp. 25-27. Thus it is apparent—and uncontested by the government—that the courts which decided these cases would never have found a "waiver" of petitioner's Sixth Amendment rights, or placed the burden on the prejudice issue on petitioner, on the record in the instant case.

Respecting the importance of this case to the administration of justice, the government acknowledges, as it must, that "[t]he court of appeals found (Pet. App. 8a-9a) that the prosecutor's conduct constituted an ethical violation." Br. in Opp. 21. Then the government takes the position, *inter alia*, that "it is our view that

the prosecutor's conduct was not unethical under the circumstances of this case." Br. in Opp. 22. As we show hereinafter, this view rests on the analytical premise that Disciplinary Rule 7-104 does not "have general application to criminal cases . . . ." Br. in Opp. 22 n.16. We demonstrate hereinafter that this premise is flatly contradicted by federal appellate decisions and, indeed, is actually rejected by the three cases the government tenders to this Court to support its position on this part of the case. See pp. 18-19, *infra*.

Moreover, the prosecutor's conduct was the incipient cause of the actual conflict of interest invading petitioner's Sixth Amendment right to the assistance of counsel with undivided loyalties.[1] Indeed, on the premise that the prosecutor telephoned the trial judge prior to the trial and informed the judge that Sykes had given a statement and that he was going to be a witness (see pp. 6-7, *infra*), the prosecutor also violated the ethical prohibition against *ex parte* communications with judges. D.R. 7-110, A.B.A. Code of Professional Responsibility.

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[1]As the government observes, "petitioner contends . . . that reversal is required because the conflict of interest arose as a result of the government attorney's misconduct in not notifying McPherson of his contacts with Sykes . . . ." Br. in Opp. 21. Yet the government maintains that "petitioner does not have standing to raise a constitutional or ethical challenge to the prosecutor's conversing with Sykes without the knowledge of Sykes' counsel." Br. in Opp. 22.

"Standing" is not an issue in this case. Thus, it is admitted that: (a) the prosecutor knew of the joint representation of petitioner and the witness; and (b) deliberately concealed from petitioner and his counsel the fact of his contacts with Sykes and Sykes' status as a cooperating witness. Assuming the prosecutor's conduct was unethical, and assuming no valid "waiver" (see pp. 12-17, *infra*), that prosecutorial misconduct was the direct cause of an invasion at petitioner's trial of his own personal Sixth Amendment right to counsel with no actual conflict of interest.

It is of vital importance to the administration of criminal justice in our federal courts that prosecutors, defense attorneys, trial judges, and individual defendants know in advance the governing rules for their behavior in the criminal justice system, especially as these rules relate to the recurring problems connected to joint representation. Defense attorneys and their clients, in deciding on the necessity for individual representation, today rely on the expectation that prosecutors will not engage in a surreptitious course of conduct—forbidden by the canons of ethics—culminating in an actual conflict of interest at trial threatening their personal constitutional rights. This case puts in issue the continued validity of that assumption, burdening the ability of lawyers and judges to discharge their duties in accordance with constitutional commands and ethical duties. Moreover, the very posture of the Department of Justice in this Court—asserting in the face of the opinion below the ethical propriety of its conduct in this case—shows the necessity for plenary review of these issues now. In this regard, we take note of the observations of then-Circuit Judge Stevens respecting the ethical prohibition of D.R. 7-104 on prosecutors communicating with criminal defendants represented by counsel:

> In a civil context I would consider this behavior unethical and unfair.[2] In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.[3] If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this.

United States v. Springer, 460 F.2d 1344, 1355 (7th Cir. 1971) (dissenting opinion) (footnotes omitted).

Hereinafter, we deal with the particular arguments the government makes regarding the contentions in our petition.

1. Sykes' Waiver of the Attorney-Client Privilege Did Not Eliminate the Actual Conflict of Interest.

As we noted, the government acknowledges "the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair . . . ." Br. in Opp. 11. But the government contends that, once faced with such an "actual" conflict of interst, the trial judge here was free to "endorse measures approved by one of the clients" (*id.*) that "will eliminate [the conflict] during trial," and that the waiver of the attorney-client privilege by the witness constituted such a measure. See *id.*, 11-15. The government's reasoning on this issue is a transparent series of non-sequiturs.

First, both petitioner and the prosecution witness (Sykes) had an equal claim to their attorney's undivided loyalty under the Sixth Amendment. The government admits that petitioner personally and emphatically rejected the trial court's proposed "measure" to resolve the conflict. See Petition 12 and compare Br. in Opp. 9-10.[2] It simply makes no sense to contend that an

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[2]After the court had denied attorney McPherson's mistrial motion and extracted a "waiver" of the attorney-client privilege from Sykes, petitioner (a lay person) personally addressed the court stating "I found out a few minutes ago that I have an attorney here representing me and a government witness," that "I certainly don't want to proceed in a trial" and that "I don't want him representing me in this trial." Tr. 326.

otherwise inappropriate measure proposed by the trial judge to resolve an admitted actual conflict of interest somehow becomes "appropriate" by virtue of the agreement of one of the clients in the face of the other client's refusal to agree.

In this section of the Opposition Brief, only one case is advanced as supporting this extraordinary contention, *United States v. Vargas-Martinez,* 569 F.2d 1102, 1104 (9th Cir. 1978), discussed at Br. in Opp. 12. The *Vargas* case stands for the opposite proposition, and, to the extent relevant, requires rejection of the government's novel contention in this Court.

In *Vargas,* the appellant was complaining that the trial court had *refused* to allow him to keep the same lawyer that represented a prosecution witness, despite his waiver of "any conflict of interest arising out of this situation . . . ." 569 F.2d at 1104. The prosecution witness (also a co-defendant who was not jointly on trial) had refused to waive any conflict of interest. The appellate court affirmed the trial court's ruling on the expressly stated "basis that the dual representation created an inescapable conflict of interest which had not been waived by both co-defendants." Not a word in this Ninth Circuit decision even plausibly supports the notion that an actual conflict of interest may be dissipated by "waiver" of one client in the face of a refusal on the part of the other client to waive.[3]

Second, the untenability of the government's position in this portion of its brief is demonstrated by the government's assertion that "*[u]pon learning of the conflict of interest,* the trial court held a hearing on the matter . . . ."

[3]Nor has the Government produced any genuine supporting authority from any other circuits for this proposition.

Br. in Opp. 11-12 (emphasis added). But, on the government's own version of the record, this statement is simply untrue. Thus, elsewhere in the Opposition Brief, the government points out that the prosecutor "did, however, inform the court of what Sykes had told him (Tr. 310)." Br. in Opp. 23. That telephone conversation between the trial judge and the prosecutor occurred *well before* the trial even began.[4] Yet, assuming this unethical *ex parte* communication occurred, the trial judge *did not* in fact hold a hearing "upon learning of the conflict of interest" (Br. in Opp. 12). We pointed out in our initial Petition that the trial judge therefore violated his affirmative duty to apprise petitioner and his counsel of the circumstances and provide him, then and there, with an opportunity to secure separate counsel. *See* Petition 26 and n.11. Yet the Opposition Brief simply ignores this point, and offers no discussion of our cited authorities.

It is instructive, though, to assume hypothetically that the trial judge, after the asserted telephone conversation, and perhaps two weeks prior to the commencement of trial, had actually called a hearing (in advance of trial) at which petitioner and McPherson were informed that Sykes had given the government inculpatory statements and was now going to be a prosecution witness. Suppose, further, that petitioner had said that, in view of this development, he wanted to retain new counsel. We submit that, under this Court's ruling in *Holloway v. Arkansas,* 435 U.S. 475, 488 (1978) (*see* Petition 27),

[4]Tr. 310. Assistant U.S. Attorney Mayo claimed "shortly after September the 9th" he called the judge "to advise you that Harold Sykes had given a statement in which—and he was going to be a witness in the trial." (To this assertion the judge responded, "I don't recall, but I am sure you did.") The trial commenced on September 26, 1977.

the trial judge incontestably would have had to allow petitioner to change attorneys, without regard to the willingness of the prosecution witness to allow himself to be cross-examined on privileged information. Here, of course, the hypothetical pre-trial hearing was never held; rather, because of the prosecutor's decision to conceal his surreptitious dealings with Sykes and the trial judge's lapse, the actual conflict could not be confronted until after the trial commenced. Assuming at this point the hearing was "untimely" (Br. in Opp. 15 n.10), with the trial judge and the prosecutor jointly having concealed from the defendant the knowledge they had shared for perhaps two weeks prior to trial, the one participant who *cannot* be blamed for the "untimeliness" regarding the hearing is the defendant.

Third, the government seeks to demonstrate the "appropriateness" of the trial judge's solution to the actual conflict of interest created by the prosecutor's misconduct by arguing that after the trial court itself "suggested that McPherson would no longer be able to represent Sykes" (Br. in Opp. 14), McPherson said Sykes didn't have to fire him, but instead, if he waived the attorney-client privilege, McPherson personally would be "covered." *Id.*, at 14, citing Tr. 318 (sic).

The short answer to this contention is that petitioner personally rejected this solution. See pp. 5-6, *supra.* Given the fact that the prosecutor and the judge together had, through their respective breaches of duty, created a circumstance where petitioner suddenly found himself in the middle of a criminal trial with his own lawyer (in the prosecutor's own words) "on both sides of the fence" (*see* Petition 9), petitioner could not be constitutionally compelled to proceed over his own personal timely

objection with a lawyer in whom his personal confidence had been shattered.[5]

Moreover, attorney McPherson's statement, now relied on by the government, must be placed in the context of the record. The first step taken by McPherson after the prosecutor's disclosure was to move for a mistrial on the ground of a "hopeless conflict" in order that petitioner would have "an opportunity to obtain counsel where there will not be a conflict." Tr. 308. That position was also urged by petitioner's local counsel. Tr. 310. The prosecutor opposed that motion (Tr. 311-13) and the trial court denied it. Tr. 313-14. Only after the court had refused petitioner a mistrial that would have allowed petitioner to get new counsel did McPherson raise the question how he could examine Sykes on privileged information. And, in raising this question, McPherson made clear that he was now talking about his own personal legal exposure in light of the Court's prior ruling denying the mistrial motion. Tr. 314.[6]

After McPherson raised his personal problems, it was the prosecutor who first proposed a waiver by Sykes of the attorney-client privilege as the solution to that problem. Tr. 315.[7] The trial judge then picked up the

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[5]It is worth emphasizing the petitioner stated at the trial that "I found out a few minutes ago that I have an attorney here representing me and a government witness." Tr. 326. The government at trial did not challenge this assertion.

[6]"We have taken care of the Court's problems and the U.S. Attorney's problems, let's talk about my problems."

[7]McPherson's response painfully illustrates the extraordinary personal professional dilemma he was trapped in by: (a) the prosecutor's surreptitious course of dealing with his client; (b) the trial judge's apparent failure to schedule a prompt pretrial hearing in

[footnote continued]

prosecutor's proposal for a waiver of the attorney-client privilege, suggesting that "we will have to talk to Mr. Sykes about that and see whether he waives his attorney-client privilege and whether he specifically wants to discharge you as his attorney." Tr. 316. Petitioner's local counsel immediately stated (Tr. 316):

> I think there is no question that without in any way changing the prior position taken by counsel for the defendant, Your Honor, that he has to waive the attorney-client privilege and discharge McPherson.

The prosecutor responded by stating (Tr. 316):

> I don't agree with that at all.

That statement clearly put the prosecutor on record as taking the position that the joint representation could go forward even over petitioner's personal objection as long as there was a waiver of the attorney-client privilege. The trial court, for its part, responded by reiterating the denial of the mistrial motion. Tr. 317. In response to the judge's reiteration of his ruling on the mistrial motion, McPherson began again to reargue that issue, to which the prosecutor interjected that (presumably on the basis of the trial judge's earlier ruling) petitioner had "entered his waiver." Tr. 317. Thereafter attorney McPherson returned to a discussion of "my problem"

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light of the *ex parte* communication from the prosecutor; and (c) the denial of the mistrial motion (Tr. 315, emphasis added):

> What I am saying is that in the representation of Sykes that I have obtained information, you know, from him in preparation of his trial and now to cross-examine him, then I may have to go after his credibility. Now, if he is still my client or unless he waives the attorney-client relationship and in writing, you know, absolves me of any responsibility— *I mean I don't know whether that does it or not, I don't know.*

(Tr. 317), making the statement relied upon by the government (Tr. 318):

The Court: Any suggestions?

Mr. McPherson: I have a suggestion.

The Court: I want to help you out any way I can, Jim.

Mr. McPherson: That is what I want. I appreciate that, and I understand that you recognize my problem. What I would request is, I don't think we have to go so far as to require Mr. Sykes to fire me. I think what he has to do before I can proceed on cross-examining him is waive the attorney-client privilege. And if he does that then I think I am protected. Now, I still urge my mistrial.

The Court: I understand that.

Mr. McPherson: But I am looking out for me too. I don't want Mr. Sykes to write the bar association and say my lawyer—

The Court: All of this could have been—

Mr. McPherson: —he got me on cross-examination and tore me up.

The Court: All of this is done on top of the table. And let it be understood that I will do anything I can to assure that there is no embarrassment to you or no reflection on you or your representation.

Mr. McPherson: Right.

The Court: I also have—as much as I love you I have a higher responsibility to this lawsuit.

Through it all sat petitioner—a lay person witnessing the spectacle of a prosecutor, having secretly gotten his own lawyer "on both sides of the fence," having implicated the trial judge through a pretrial *ex parte* communication, and naving proposed a solution leaving his own lawyer with the joint representation, now succeeding in selling his proposed solution as a way out of the defense lawyer's, the judge's, and the prosecutor's problems. The whole spectacle left petitioner naked and isolated, with the trial judge and defense lawyer reduced to scrambling to cover themselves in light of the prosecutor's actions. Fortunately, petitioner had the presence of mind to stand up and protest this convenient solution among the lawyers and the judge; yet, even had he stood silent, no appellate court, mindful of the Sixth Amendment's command, should tolerate a conviction secured after such a spectacle in an American courtroom.[8]

2. There Was No "Waiver" of Petitioner's Sixth Amendment Right.

The Brief in Opposition does not challenge our assertion that, under the cases of this Court and all the other circuits, the government has the burden of proving waiver

[8]Attorney McPherson did his best to protect his client by moving first for a mistrial and re-urging that motion. And co-counsel specifically objected to the adequacy of the prosecutor's and the trial judge's proposed solution to the actual conflict. In light of the court's ruling, attorney McPherson found himself forced on the record to concentrate on protecting himself, the precise posture a trial judge must never be allowed to put a criminal defense lawyer in. *See generally* Petition, pp. 15-21.

in this case under the strictest possible standards. See *Brewer v. Williams,* 430 U.S. 387, 403-04 (1977); Petition, pp. 23-24, and cases cited therein. Rather, the Brief in Opposition now advances three circumstances to argue that the government has met its stringent burden in this case: (1) the May, 1974 hearing; (2) the testimony of another original co-defendant (Ben Trantham) at petitioner's second trial; and (3) the filing by the prosecutor of writs of *habeas corpus ad testificandum* to secure the presence at trial of Sykes and two other incarcerated convicted co-defendants. See Br. in Opp. 18-21. Again, the government's arguments fail.

First, as the lower court in this case actually acknowledged, and as we pointed out in our Petition, a valid finding of waiver cannot be based on Judge Scott's May, 1974 hearing alone, since the operative events giving rise to the actual conflict of interest—the prosecutor's secret dealings with Sykes leading to his status as a prosecution witness—had not yet occurred. See Petition, 13a; *id.*, 26-27. The Brief in Opposition does not challenge this assertion; instead, after referring to the May, 1974 hearing (Br. in Opp. 18-19), the Brief slides off into reliance on the other two enumerated factors. *Id.*, 20-21.

Suppose, then, that at the time of the May, 1974 hearing, the prosecutor had secretly secured inculpatory statements from one of the co-defendants. Assume further that writs of *habeas corpus ad testificandum* had issued at the prosecutor's request to assure the availability of the co-defendant as well as others, and that at an earlier trial another co-defendant had testified, but that petitioner had gotten different counsel to represent him at that trial. Suppose the prosecutor had allowed the May 1974 hearing to go forward without telling the judge or his opponent about his secret arrangement with one

of the defendants standing in the courtroom. Or, indeed, assume alternatively that the prosecutor had told Judge Scott in an *ex parte* telephone conversation before the May 1974 hearing that he had lined up one of the jointly represented co-defendants as a prosecution witness, and Judge Scott had failed to disclose this communication to petitioner or his counsel at or prior to the May, 1974 hearing. We submit that no lawyer would attempt to persuade this Court or any appellate court that the government had, in these circumstances, met its burden by going forward with the 1974 hearing exactly as it occurred, with petitioner and his lawyer kept in the dark by the prosecutor and/or the trial judge as to the true status of the co-defendant. Yet the stated hypothetical facts reflect the actual record in this case as it stood some two weeks or more prior to the commencement of petitioner's third trial.

In any event, in our Petition we discussed several cases in which other courts had confronted factual circumstances going far beyond the enumerated factors relied upon to show "waiver" here, and yet rejected "waiver" claims.[9] The Brief in Opposition fails to distinguish these cases, or to offer this Court even a single authority plausibly supporting its assertion that a valid finding of waiver may be made on the basis of the enumerated factors.[10]

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[9] *Zuck v. Alabama, supra,* 588 F.2d at 440; *People v. Stoval,* 40 Ill. 2d 109, 113-14, 239 N.E.2d 441, 444 (1968). *See* Petition, 25; *see also Stephens v. United States, supra,* 595 F.2d 1067, discussed at Petition, p. 18.

[10] The Brief in Opposition relies on *United States v. Villarreal,* 554 F.2d 235, 236 (5th Cir.), *cert. dismissed,* 434 U.S. 802 (1977), as standing for the proposition that "a defendant can waive not

[footnote continued]

Finally, the government's miscellaneous assertions on the waiver issue merely serve to demonstrate again the necessity for plenary review in this case.

First, respecting the May, 1974 hearing, the government simply ignores the fact that at the conclusion of that hearing, McPherson stated to Judge Scott that "if any of these individuals in any way indicate to me any possible conflict or concern that they have I would like to feel free to bring it to the court," and that "I don't want to represent someone in that situation or have them feel that they aren't getting their best representation." M. Tr. 10. The Court agreed to McPherson's suggestion, cautioning him that "I don't want that to happen in the middle of a trial." *Id.* Again, suppose at that very moment the prosecutor and the trial judge had been secretly concealing the knowledge that one of "these individuals" had already been converted into a cooperating prosecution witness.

Second, respecting the writs of *habeas corpus ad testificandum,* Assistant U.S. Attorney Mayo, in the lengthy colloquy ensuing after he finally disclosed his secret dealings with Sykes and the trial judge, made no reference whatsoever to this factor as putting petitioner's counsel on notice that Sykes would be called as a prosecution witness. Indeed, a fair reading of the entire relevant transcript (Tr. 295-370) shows that all the participants in these events—the prosecutor, both defense attorneys, the trial judge, and McPherson—uniformly reacted

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only existing conflicts, but also possible conflicts to which he had been alerted." See Br. in Opp. 20 n.15. In *Villarreal,* the Court found a valid waiver on the basis that the defendant had been warned by the trial judge of the actual facts creating the conflict. There were no intervening operative facts rendering the judge's prior warning inadequate.

throughout to the prosecutors' disclosure as total surprise to both McPherson and petitioner. That of course simply reflects what prosecutor Mayo and every experienced attorney well know: *i.e.*, in a criminal trial where the government has in custody potentially involved co-defendants whose presence at trial might subsequently be needed by *either* side or, indeed, the trial judge himself, it is a frequent precaution for the prosecutor to secure such writs to move the incarcerated persons into the jurisdiction in advance of trial. From the mere issuance of such a writ for one of his own clients, no experienced defense lawyer would draw the inference that the prosecutor had secretly lined up the client as a cooperating witness. McPherson, after all, had a right to rely on the assumption that the prosecutor would abide by the canons of ethics and refrain from communicating with his client without advance notice. Moreover, as McPherson stated at the trial after Mayo disclosed his surreptitious dealings with Sykes, "[a]t no time in my representation of Mr. Sykes was there a conflict between the version of the facts that Mr. Sykes gave me as to my other client, Mr. Partin." Tr. 306. The government has never contested this statement; it is apparent that McPherson therefore had no facts in his possession on which to assume that Sykes would testify to a story different from the one he had been consistently telling his own lawyer. The writs, then, are a transparent make-weight argument thought up *post hoc* on appeal in a vain attempt to avoid the inescapable record actually made by the prosecutor and the trial judge at the time of the operative events.[11]

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[11]The first time the issuance of these writs was ever mentioned was in the government's brief on appeal. Yet, not even the lower

[footnote continued]

Finally, respecting the testimony at petitioner's second trial of Ben Trantham (another co-defendant represented by McPherson), the short answer to this supposed indicium of "waiver" is that petitioner secured different counsel to represent him at this second trial, and Trantham had died before the commencement of the third trial. From these circumstances, the only logical inference is that the government should have assumed that petitioner would not go into a third trial represented by a lawyer who also represented a prosecution witness.[12]

3. The Prosecutor's Conduct Violated D.R. 7-104

The Opposition Brief challenges the lower court's finding that the prosecutor's surreptitious dealings with Sykes violated D.R. 7-104, contending, *inter alia*, that: (1) "D.R. 7-104 is of marginal relevance where the defendant's conviction has been affirmed on appeal and the only remaining stage of the case is a pending

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court, which strained every circumstance in the trial record to find a waiver, was willing to rely on this factor.

Moreover, we note that the government is simply contradicting itself in attempting to show that the prosecutor was putting McPherson on notice that Sykes had become a prosecution witness. Elsewhere in the Brief in Opposition, the contention is made that the prosecutor acted ethically in "respecting" Sykes' request that he inform "no one" of his cooperation, for alleged fear of his safety. Br. in Opp. 23. If that was Mayo's true motivation, then he could not have intended, nor could he have expected, that issuance of the writs would put McPherson "on notice that his client might be called." *Id.*, 24. As with so many other aspects of the government's brief in this Court, these assertions are simply a hopeless tangle of self-contradictions.

[12]The record also indicates that Trantham actually ended up testifying at petitioner's second trial *both* as a defense and a government witness. Tr. 31.

petition for a writ of certiorari," Br. in Opp. 22; and (2) D.R. 7-104 should not "have general application" to criminal cases. *Id.*, n.16.

First, the government does not proffer to this Court an iota of logic, policy, or case support for the extraordinary statement that the ethical prohibitions of D.R. 7-104 have "marginal relevance" to defendants seeking relief in this Court from convictions they claim were unlawfully secured. Surely, though, such a statement, proffered by the most prestigious legal office of the Department of Justice, should command the closest scrutiny of this Court. This Court should grant plenary review of this case, so the Department's lawyers, as well as defense attorneys and their clients, can have no doubts as to their proper ethical footing when a case is presented to this Court for review.

Second, as the very authorities relied upon by the Brief in Opposition (at page 24) demonstrate, D.R. 7-104 applies to criminal cases. *See United States v. Crook,* 502 F.2d 1378, 1380 (3d Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975); *Moore v. Wolff,* 495 F.2d 35, 37 (8th Cir. 1974); *United States v. Masullo,* 489 F.2d 217, 223 (5th Cir. 1973).[13] *See also United States v. Springer,*

[13]The Opposition Brief cites these three cases, albeit with a "cf." signal, as standing for the proposition that, "[u]nder these circumstances, there was clearly no ethical violation." Br. in Opp. 24. None of them support that statement; indeed, two of the cases indicate that: (a) the courts recognize the application of the relevant ethical prohibition to criminal cases; and (b) the likelihood that the conduct there in issue violated the ethical rules. *United States v. Crook, supra,* 502 F.2d at 1380; *Moore v. Wolff, supra,* 495 F.2d at 37. In *United States v. Masullo, supra,* the court found no violation of D.R. 7-104 because there the defendant's alleged attorney actually represented him in other unrelated state criminal cases. *See* 489 F.2d at 223. But in

[footnote continued]

460 F.2d 1344, 1353-54 (7th Cir. 1971), *cert. denied,* 409 U.S. 873 (1972); *Wilson v. United States,* 398 F.2d 331, 333 (5th Cir. 1968), *cert. denied,* 393 U.S. 1069 (1969); *United States v. Thomas,* 474 F.2d 110, 112 (10th Cir.), *cert. denied,* 412 U.S. 932 (1973).[14]

Thus the Brief in Opposition again fails to offer this Court a single authority even plausibly supporting its assertions that D.R. 7-104 does not have "general application" to criminal cases and that the rule was not violated by the prosecutor in this case. Moreover, the reasoning of the government to support those assertions fails.

The Brief in Opposition cites *Faretta v. California,* 422 U.S. 806 (1975), as supporting the proposition that Sykes had "a constitutional right to act on his own behalf in communicating with the government under the circumstances here presented." Br. in Opp. 21-22. *Faretta* held that a criminal defendant has a constitu-

Masullo the court actually collected the authorities demonstrating that "prosecutors in criminal proceedings are governed by [D.R. 7-104]." 489 F.2d at 223 n.3.

These cases do question the application of the exclusionary rule to statements secured in violation of the canons of ethics, an issue not posed in this case, where the government has acknowledged the "general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair." Br. in Opp. 11.

[14]The Brief in Opposition suggests that the rule in *Massiah v. United States,* 377 U.S. 201 (1964), should govern the allowable contacts between Federal prosecutors and criminal defendants in lieu of D.R. 7-104. Br. in Opp. 22 n.16. This Court's decision in *Massiah* cannot be read as intending to displace the ethical restraints on prosecutors. *See* Justice White's dissent in *Massiah,* 377 U.S. at 210-11; *see also United States v. Springer, supra,* 460 F.2d at 1354; *United States v. Thomas, supra,* 474 F.2d at 112.

tional right to represent himself in a state criminal case; nothing in that case suggests that the Court intended to question the constitutionality of prohibiting government lawyers from surreptitiously dealing with lay persons whom the government has sued and whom the government knows are represented by counsel. Indeed, if the government has correctly read *Faretta,* then that case puts in doubt the constitutionality of D.R. 7-104 in all its applications, civil and criminal.

The ethical confusion manifested by the Brief in Opposition should be of the greatest concern to this Court. Thus it is argued that "[a] lawyer for the government cannot be thought to commit an ethical violation when he respects the wishes of an individual to exercise his constitutional right to represent himself in dealings with the government." Br. in Opp. 23. But, while prosecutor Mayo was engaging in surreptitious dealings with Sykes, the latter continued to be represented by Attorney McPherson; indeed, McPherson at the time was actually appointed by the court to represent Sykes. See Opp. Br. 7 n.5. If Sykes wished to "represent" himself, he was free to apply to the court under *Faretta* to discharge his lawyer. Until McPherson was discharged, the prosecutor was ethically bound to refrain from talking to Sykes without first getting McPherson's permission, without regard to Sykes' personal desires for concealment of his dealings with the government.[15]

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[15] We pointed out in our Petition—and the government does not question—that: (a) nothing in the record supports any contention that petitioner had ever made any threats against any witnesses in connection with this indictment; and (b) there was never any explanation why Sykes in any event could not have been adequately protected by the government. Petition 8 n.5.

4. The Government's "No-Specific-Prejudice" Arguments Fail

We note that, assuming we have demonstrated there existed an unwaived actual conflict of interest in McPherson's joint representation of petitioner and Sykes, and, assuming that any "untimeliness" in the discovery of this conflict was the fault of the prosecutor and/or the trial judge, petitioner's conviction must be reversed without the necessity to demonstrate "specific prejudice." See Pet. 27-28; *see also Stephens v. United States, supra,* 595 F.2d at 1069-70. *A fortiori,* the lower court's decision here, which placed the burden of proof on this issue on petitioner (Pet. App. A, p. 17a), must be reversed.

Moreover, the government's attempt to demonstrate the absence of prejudice merely confirms the wisdom of this Court's warning in *Holloway v. Arkansas, supra,* 435 U.S. at 491, against indulging in *post hoc* "unguided speculation" as to the tactical decisions of lawyers on a cold record. It is noteworthy that the government makes no attempt to persuade this Court that Sykes' testimony was insignificant or merely cumulative. Also, as the government correctly states, Sykes (as well as McPherson) certainly knew from the witness stand that prosecutor Mayo was the government official "responsible for his fate." Br. in Opp. 23. Yet this witness—so damaging to petitioner and so painfully vulnerable on cross-examination—was not significantly cross-examined at all.

The government's sole explanation for this event is that this Court may infer from the record that McPherson made a tactical judgment to "limit" his cross-examination of Sykes because he did not want Sykes' conviction brought out. Br. in Opp. 16. The lynchpin of this

reasoning is that "McPherson's cross-examination of co-defendant Jack Gremillion, Jr., . . . was limited in the same manner . . . ." *Id.* at 17.

That is simply not so. Gremillion was cross-examined by McPherson fairly extensively. *See* Tr. 261-83; *compare* the cross-examination of Sykes, Tr. 368-70. Yet, when the prosecutor tried to use the cross-examination to justify bringing out Gremillion's prior conviction, the trial judge sustained McPherson's objection. Tr. 291. Thus, McPherson must have known that the trial judge would have permitted at least some significant cross-examination of Sykes without allowing the prosecutor to put in his prior conviction. Yet McPherson made no significant attempt at all to test Sykes' recollection or otherwise pin down or limit the damaging effect of his testimony.

Most importantly, whatever McPherson's subjective thoughts were as he confronted the spectacle of his client Sykes waiting to be cross-examined on behalf of his client Partin, we submit that petitioner had an absolute constitutional right to have such critical tactical judgments made by an attorney unencumbered by a conflict of interest generated by the lapses of the prosecutor and the trial judge.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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